No. 91-285

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

SETH C. PASKON, M.D.,
Petitioner,

vs.

SALEM MEMORIAL HOSPITAL DISTRICT, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, SOUTHERN DISTRICT

P. TERENCE CREBS
HERZOG, CREBS & MCGHEE
555 Washington Avenue
Sixth Floor
St. Louis, Missouri 63101
(314) 231-6700

Attorneys for Petitioner

August 1, 1991

St. Louis Law Printing, Inc. 13307 Manchester Rd. St. Louis, MO 63131 314-231-4477

QUESTION PRESENTED

Was the suspension of petitioner's active medical staff privileges and its continuation improper because such suspension and its continuation was arbitrary, capricious and unreasonable in violation of the constitutional protection against deprivation of protected rights without due process of law under the Fourteenth Amendment to the United States Constitution?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions and Statutes:

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

SETH C. PASKON, M.D.,

Petitioner,

VS.

SALEM MEMORIAL HOSPITAL DISTRICT, GEORGE BAY, JUDY THOMPSON, GARY PLANK, JIM HOCKER, FERN HIGHLEY and DENNIS FIEBELMAN, as the DIRECTORS OF THE SALEM MEMORIAL HOSPITAL DISTRICT; JUDY THOMPSON, GARY PLANK and JOHN DEMORLIS, M.D. as MEMBERS OF A PURPORTED HEARING COMMITTEE OF THE SALEM MEMORIAL HOSPITAL DISTRICT; and JOHN DEMORLIS, M.D., TED C. TANG, M.D., and CHARLES CUNNINGHAM, D.O., as the MEMBERS OF THE EXECUTIVE COMMITTEE OF THE MEDICAL STAFF OF THE SALEM MEMORIAL HOSPITAL DISTRICT,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, SOUTHERN DISTRICT

Petitioner, Seth C. Paskon, M.D., respectfully prays that a writ of certiorari issue to review the Opinions of the Missouri Court of Appeals, Southern District, entered in this proceeding on January 28, 1991 and May 11, 1991.

OPINIONS BELOW

The Order of the Supreme Court of Missouri denying petitioner's application for transfer from the Missouri Court of Appeals, Southern District, No. 73628, is not officially reported. The Order is set forth in the Appendix hereto at A-1. The date of the Order of the Supreme Court of Missouri is May 3, 1991.

The Opinion of the Missouri Court of Appeals, Southern District, No. 16879, denying petitioner's motion for rehearing or to transfer to the Missouri Supreme Court, is reported at 806 S.W.2d 424. The Opinion of the Missouri Court of Appeals, Southern District, denying petitioner's motion for rehearing or transfer to the Missouri Supreme Court is set forth in the Appendix hereto at A-2. The date of such Opinion is March 11, 1991.

The Opinion of the Missouri Court of Appeals, Southern District, No. 16879, is reported at 806 S.W.2d 417. The Opinion is set forth in the Appendix hereto at A-8. The date of the opinion of the Missouri Court of Appeals, Southern District, is January 28, 1991.

The judgment of the Missouri Court of Appeals affirmed the Judgment and Order of the Circuit Court of Reynolds County, Missouri, per the Honorable Donald E. Lamb, No. CV789-71CC. The Circuit Court's judgment is not officially reported. The Circuit Court's judgment is set forth in the Appendix hereto at A-21. The date of the Circuit Court's judgment is January 19, 1992

The decision of the Circuit Court of Reynolds County, Missouri upheld the summary suspension of petitioner and the continuation thereof by the Board of Directors of respondent Salem Memorial Hospital District. Such action of the Board of Directors is set forth in the minutes of the Board of Directors contained in the Appendix at A-24. The date of the action of the Board of Directors is February 27, 1989.

JURISDICTION

The Order of the Supreme Court of Missouri denying petitioner's application to transfer was entered on May 3, 1991. This petition for writ of certiorari has been filed within ninety (90) days of the denial of the petitioner's application to transfer by the Missouri Supreme Court.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case concerns petitioner's right to due process of law as guaranteed petitioner by the Fourteenth Amendment to the United States Constitution.

The verbatim text of this constitutional provision is set forth in Appendix F hereto.

STATEMENT OF THE CASE

A. PARTIES[1]

Petitioner Seth C. Paskon, M.D. ("Dr. Paskon"), is a citizen and resident of Dent County, Missouri, and is a duly licensed physician in the State of Missouri. Dr. Paskon engages in the private practice of medicine, and his office is in Salem, Missouri. Dr. Paskon, who is Board Certified in both Internal Medicine and Pediatrics, first became a member of the active Medical Staff of the Salem Memorial District Hospital ("the Hospital") in 1974, and he was reappointed annually to the active Medical Staff of the Hospital, most recently on January 23, 1989, by the unanimous vote of the Hospital's Board.

---

[1] A list of all parties to the proceeding is set forth in the caption on page 1 hereof.

Respondent Salem Memorial Hospital District ("SMHD") is a hospital district duly organized and existing pursuant to Chapter 206 Mo. Rev. Stat. (1986), the "Hospital District Law". SMHD owns and operates the Hospital. The members of the Hospital's Board of Directors are respondents Bay, Thompson, Plank, Hocker, Highley and Fiebelman. The members of the Executive Committee of the Hospital Board of Directors are its chairman, vice-chairman and secretary/treasurer; namely, respondents Bay (chairman), Thompson (vice-chairman) and Plank (secretary/treasurer), respectively.

B. GENERAL BACKGROUND

Section 206.105.1 Mo. Rev. Stat. (1986) requires a hospital district to adopt bylaws. Section 206.105.2 further requires the medical staff of a hospital operated by hospital district to have bylaws, rules, regulations and policies. Section 206.105 is set forth in the Appendix at A-30, and pertinent provisions of the Bylaws, Rules and Regulations of the Hospital's Medical Staff are set forth in the Appendix at A-31. The Medical Staff's Bylaws, Rules and Regulations were adopted by the Medical Staff of the Hospital on May 16, 1988, and were later approved by the governing body of the Hospital, the Board of Directors, on May 23, 1988.

Dr. Paskon first became a member of the active Medical Staff of the Hospital in 1974. Since that time, Dr. Paskon has been reappointed annually to its active Medical Staff, most recently on January 23, 1989, by action of respondent Board of Directors of the Hospital.

In 1986, the Missouri Board of Registration for the Healing Arts began an investigation involving Dr. Paskon. As a result of that investigation, Dr. Paskon voluntarily entered into a Stipulation and Probation Agreement with the Missouri Board of Registration for the Healing Arts dated April 1, 1988. That

probation agreement had the effect of placing Dr. Paskon's license to practice medicine on probation for three (3) years effective retroactively from September 12, 1987 to September 11, 1990.[2] During the summer of 1988, Dr. Paskon's name appeared on a list of physicians, published in Missouri, whose licenses had been placed on probation. Dennis P. Pryor, the Hospital's administrator and chief executive officer, telephoned Dr. Paskon in July or August, 1988 and asked to obtain a copy of the Stipulation and Probation Agreement. Despite this knowledge of the Hospital's administrator, as well as its Board, no action was taken by the Hospital as a result of Dr. Paskon's probation agreement.

On February 27, 1989, an executive session of the Board of Directors of the Hospital was held during which a motion was made by respondent Hocker and seconded by respondent Feibelman, to summarily suspend Dr. Paskon as an active member of the Medical Staff of the Hospital, with the following named respondent directors voting in favor of said motion: Judy Thompson, Jim Hocker, Fern Highley and Dennis Feibelman. The stated reason for Dr. Paskon's summary suspension was his failure to have a current and valid federal narcotics license.[3] When Dr. Paskon was informed of said vote, resulting in his summary suspension, he was also informed that he could make a request to the Medical Staff for a hearing concerning such

---

[2] This probation, agreed to by Dr. Paskon, in no way prevented him from practicing medicine in Missouri and was timed in order to allow Dr. Paskon to attend a specific continuing medical education course concerning the prescription of controlled substances. It merely placed him on notice as to any future violations. Moreover, when the State Board had heard the relevant testimony regarding the matter out of which the probation arose, the State Board entered an Early Termination Order, thus ending the probationary period on June 23, 1989.

[3] Dr. Paskon received his federal (DEA) narcotics license on March 3, 1989, four (4) days after the summary suspension.

suspension. On March 27, 1989, Dr. Paskon requested, by letter to the chief of staff of the Medical Staff, respondent Demorlis, that the Medical Staff Executive Committee conduct a hearing on the summary suspension levied by the Board of Directors. As a result of that letter, the Executive Committee of the Hospital's Board of Directors, but not the Medical Staff, met on April 7, 1989, and while they agreed that Dr. Paskon was entitled to a hearing, they concluded that because the governing board had suspended Dr. Paskon, the governing board should conduct the hearing. The Board of Directors' Executive Committee then decided that pursuant to Article VIII, Section I(b) of the Medical Staff Bylaws Rules and Regulations, a committee was to be appointed by the Board of Directors to hear Dr. Paskon's case. A copy of the minutes of the April 7, 1989 Executive Committee meeting is set forth in the Appendix at A-49.

By letter dated April 10, 1989, the Executive Committee of the Board of Directors informed Dr. Paskon that he was entitled to a hearing pursuant to Article VIII, Section I(b) of the Medical Staff Bylaws Rules and Regulations, and that in accordance with Article VIII, Section IV(b), the chairman of the Hospital's Board of Directors had appointed a hearing committee that consisted of Judy Thompson, chairman, Gary Plank and John Demorlis, M.D., chief of staff. The hearing was set for April 17, 1989 at 8:00 a.m. No attorney would be allowed at said hearing allegedly pursuant to Article VIII, Section V(j). The letter, which was signed by Dennis P. Pryor, Administrator, is set forth in the Appendix at A-51.

By letter dated April 14, 1989, Austin L. Mitchell, an attorney for Dr. Paskon, informed Mr. Pryor that Dr. Paskon's request for a hearing was made pursuant to Article VII, Section II(b) of the Medical Staff Bylaws Rules and Regulations, and not Article VIII. That letter also placed respondents on notice that it was Dr. Paskon's contention that any hearing other than one conducted by the Executive Committee of the Medical Staff would be in

violation of the procedures outlined in the Medical Staff Bylaws, Rules and Regulations concerning the summary suspension of Dr. Paskon's clinical privileges. Mr. Mitchell's April 14, 1989 letter is included in the Appendix at A-53. Respondents, rather than address the letter dated April 14, 1989 from Mr. Mitchell, chose to go forward with the scheduled hearing before the Board-appointed *ad hoc* committee, and when Dr. Paskon did not appear, Mr. Pryor wrote another letter to Dr. Paskon informing him that his failure to appear, without good cause at the *ad hoc* committee hearing, had been deemed a waiver of his right to a hearing on his summary suspension. Mr. Pryor's letter of April 17, 1989 is set forth in the Appendix at A-55.

As a consequence of Mr. Pryor's letter of April 17, 1989, Mr. Mitchell, on April 24, 1989, by letter again reiterated Dr. Paskon's request for a hearing on his summary suspension pursuant to Article VII, Section II(b) of the Medical Staff Bylaws Rules and Regulations. Mr. Mitchell's April 24, 1989 letter is set forth in the Appendix at A-57.

On April 17, 1989, however, the Medical Staff met and unanimously approved Dr. Paskon's application for reappointment to the Medical Staff. The Medical Staff Executive Committee met prior to that meeting, reviewed Dr. Paskon's application and unanimously agreed that all credentials were in order. The minutes of the April 17, 1989 meeting of the Medical Staff are set forth in the Appendix at A-59.

By letter of April 21, 1989, Dennis P. Pryor, the Hospital's Administrator, informed Dr. Paskon that Gary Plank would like to meet with Dr. Paskon personally, and explain to Dr. Paskon that the Board of Directors wanted Dr. Paskon to appear at their regular meeting dated April 24, 1989. In that letter, Mr. Pryor indicated that the April 24, 1989 meeting would be "closed record, closed vote with the tape machine off and no attorneys present so everyone is free to speak." Mr. Pryor's April 21, 1989 letter is set forth in the Appendix at A-62.

Upon advice of counsel that such a meeting with the Hospital's Board to consider the granting of active Medical Staff privileges, the summary suspension, and failure to appear at the April 17 *ad hoc* committee hearing would be in contravention of the Medical Staff Bylaws, Rules and Regulations, Dr. Paskon did not attend the April 24, 1989 meeting.

A motion was made at the meeting of the Hospital's Board on April 24, 1989, and in Dr. Paskon's absence, that Dr. Paskon's application for privileges be denied, contrary to the recommendation of the Medical Staff Executive Committee. That motion carried by a four to one vote. Minutes of the April 24, 1989 meeting of the Board of Directors are set forth in the Appendix at A-63.

Dr. Paskon timely requested a hearing to review the decision of April 24, 1989 denying him Medical Staff privileges, pursuant to the Medical Staff Bylaws, Rules and Regulations. A hearing was held on June 9, 1989, at which time Dr. Paskon presented his reasons for not attending the Board meeting. No resolution was reached at that meeting. At a June 23, 1989 joint conference meeting, a motion was made by Judy Thompson that the minutes of the various meetings concerning Dr. Paskon be transmitted to the entire Board and that the Board would make the final decision. That motion carried. Minutes of the June 23, 1989 joint conference meeting are set forth in the Appendix at A-66.

Dr. Paskon's probationary agreement with the Board of Registration for the Healing Arts was terminated on June 23, 1989, and Dr. Paskon was again unconditionally licensed to practice medicine in Missouri as of that date. The Hospital's Board, however, has, to date, refused to reinstate Dr. Paskon's Medical Staff privileges.

Dr. Paskon filed suit for declaratory relief concerning his summary suspension, and in the alternative, he sought injunctive relief. On January 19, 1990, a Judgment and Order was entered

in the Circuit Court of Reynolds County, Missouri (Donald E. Lamb, Judge) holding that Dr. Paskon, on February 27, 1989, was automatically suspended, not summarily suspended, as a consequence of the probation agreement he had entered into with the Board of Registration for the Healing Arts and that he was not entitled to a hearing.

On January 28, 1991, after briefing by the parties, the Missouri Court of Appeals, Southern District (the "Court of Appeals") handed down its Opinion affirming the judgment of the Circuit Court on totally different grounds from that upon which Judge Lamb based his decision. The grounds of the Court of Appeals also differed from those given by the Board when it suspended Dr. Paskon's privileges. The Court of Appeals also held that Dr. Paskon was not entitled to a hearing.

Dr. Paskon timely moved in the Court of Appeals for a rehearing or for transfer to the Supreme Court of Missouri. On March 11, 1991, the Court of Appeals handed down an addendum to its Opinion by which it denied Dr. Paskon's motion for rehearing or for transfer.

On or about March 20, 1991, Dr. Paskon filed his Application For Transfer in the Supreme Court of Missouri, which Application was denied by Order of the Supreme Court of Missouri filed on May 3, 1991.

REASONS FOR GRANTING THE WRIT

THE SUSPENSION OF PETITIONER'S ACTIVE MEDICAL STAFF PRIVILEGES AND ITS CONTINUATION WAS IMPROPER BECAUSE SUCH SUSPENSION AND ITS CONTINUATION WAS ARBITRARY, CAPRICIOUS AND UNREASONABLE IN VIOLATION OF THE CONSTITUTIONAL PROTECTION AGAINST DEPRIVATION OF PROTECTED RIGHTS WITHOUT DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

SMHD is an agent and instrumentality of the State of Missouri. As such, ". . . it is sufficiently linked with the state for its acts to be subject to the limitations of the Fourteenth Amendment." *Meredith v. Allen County War Memorial Hospital Commission,* 397 F.2d 33, 35 (6th Cir. 1968). *See also, Woodbury v. McKinnon,* 447 F.2d 839, 842 (5th Cir. 1971).

To withstand substantive due process scrutiny, a hospital's decision to deny medical staff privileges ". . . must be untainted by irrelevant considerations and supported by sufficient evidence to free it from arbitrariness, capriciousness or unreasonableness." *Woodbury v. McKinnon, supra,* 447 F.2d at 842. *See also, Yashon v. Hunt,* 825 F.2d 1016, 1027 (6th Cir. 1987); *Klinge v. Lutheran Charities Association of St. Louis,* 523 F.2d 56, 61 (8th Cir. 1975). "In the medical context, substantive due process is satisfied if decisions are judged on grounds that are reasonably related to the purpose of providing adequate medical care." *Marin v. Citizens Memorial Hospital,* 700 F. Supp. 354, 359 (S.D. Tex. 1988). *See also, Everhart v. Jefferson Parish Hospital District No. 2,* 757 F.2d 1567, 1571 (5th Cir. 1985).

By the foregoing standards, the suspension of Dr. Paskon's Medical Staff privileges at the Hospital and its continuation was

arbitrary, capricious and unreasonable in violation of his right to substantive due process under the Fourteenth Amendment to the United States Constitution.

A. The Board of Directors' Summary Suspension of Dr. Paskon's Medical Staff Privileges Was Arbitrary and Unreasonable.

On February 27, 1989, Dr. Paskon's Medical Staff privileges were summarily suspended by the Hospital's Board of Directors for his failure to have a current and valid federal narcotics license. In the minutes of the February 27, 1989 Board of Directors' meeting, it is stated:

> A motion was made by Jim Hocker, seconded by Dennis Fiebelman that the Board suspend the privileges of Dr. Seth Paskon as of 2/27/89 (10:45 p.m.) for failure to have a current and valid federal narcotics license, pursuant to the summary suspension provisions of the Medical Staff Bylaws.

Dr. Paskon's summary suspension, for the reason stated by the Board of Directors, is arbitrary and unreasonable because (1) failure of a physician to have a federal (DEA) narcotics license is not a reason for which a summary suspension may be imposed under the Medical Staff Bylaws, (2) a physician practicing in the Hospital does not need a federal narcotics license because the physician may prescribe controlled substances under the Hospital's license, and (3) in any event, Dr. Paskon's DEA license was, in fact, physically received by Dr. Paskon on March 3, 1989.

The Medical Staff Bylaws authorize in two (2) different places a summary suspension by certain designated individuals or groups of individuals - Art. VI, § II e in the case of physicians

having "temporary privileges"[4] and Art. VII § II a in the case of physicians having active Medical Staff privileges.

The summary suspension was based on Dr. Paskon's failure to have a current and valid federal narcotics license, one issued by the U.S. Drug Enforcement Administration. The sole basis for a summary suspension under the Medical Staff Bylaws is a determination either "that the life or death of such patient(s) would be endangered by continued treatment by the practitioner" (Art. VI, § II e - temporary privileges) or that it is "in the best interest of patient care" (Art. VII, § II a - active medical staff privileges). Notwithstanding, the Opinion of the Court of Appeals holds the Board may summarily suspend for *any* reason it deems sufficient. Failure to have a DEA license has nothing to do with either possible life or death of a patient or the best interest of patient care, the only two (2) permissible grounds for the imposition of a summary suspension. Thus, the stated rationale for Dr. Paskon's summary suspension is unsupported by the Medical Staff Bylaws provisions governing summary suspension of members of the Medical Staff. Consequently, Dr. Paskon's summary suspension for the stated reason that he did not have a current and valid federal narcotics license is, on its face, arbitrary and unreasonable.

Furthermore, the fact that Dr. Paskon's DEA license was not current in no way impacted or affected the Hospital. Prescription of controlled substances in the Hospital by physicians on its Medical Staff is covered by the Hospital's DEA license. Moreover, the Stipulation and Probation Agreement, a copy of which was provided to the Hospital, was specifically applicable to Dr.

---

[4] Following the imposition of the summary suspension on February 27, 1989 and the issuance of Dr. Paskon's DEA license four (4) days later, Dr. Paskon was granted temporary privileges, which privileges were never suspended, but they were terminated in August, 1989, when the Hospital's Board refused to reappoint him to the active Medical Staff.

Paskon's office DEA license only. At least one Board member, Gary Plank, was aware of this fact. Therefore, there is no rational connection between Dr. Paskon's failure to have a current and valid DEA narcotics license on February 27, 1989, and the Board's action of summarily suspending Dr. Paskon's Medical Staff privileges on such date for such purported reason.

Finally, it is uncontroverted that Dr. Paskon, in fact, received physical possession of his DEA license on March 3, 1989, four (4) days after his summary suspension by the Board of Directors, and the same day he was granted temporary privileges at the Hospital.[5]

On March 20, 1989, Dr. Paskon reapplied for staff privileges and his request was referred to the Medical Staff Executive Committee. On April 17, 1989,[6] the Executive Committee of the Medical Staff met and unanimously approved Dr. Paskon's application for reappointment to the Medical Staff. These facts clearly demonstrate that had Dr. Paskon been afforded the hearing before the Medical Staff Executive Committee required by the Medical Staff Bylaws, Dr. Paskon's summary suspension would have been overturned.[7] Instead, even though Dr. Paskon

---

[5] The fact that Dr. Paskon was granted temporary privileges only four (4) days after his summary suspension further demonstrates that his summary suspension was for reasons other than concerns over patient care, the only basis for summary suspension under the Medical Staff Bylaws.

[6] *I.e.*, the same date as the *ad hoc* committee meeting which Dr. Paskon refused to attend on advice of counsel.

[7] The most astounding holding of the Court of Appeals was: "Such a hearing was not required when the plaintiff admitted he had not received and did not have a federal narcotics license required as a prerequisite to practicing in the hospital." (Appendix, p. A-19). This holding not only flies in the face of the well established precedent that a physician, whose privileges have been revoked or otherwise limited, has a constitutional right of due process to a hearing by a fair minded group of physicians, but it also misperceives the scope of the hearing mandated by the Medical Staff Bylaws arising from a

(Footnote 7 continued on next page)

had received his federal narcotics license, and even though the Medical Staff unanimously approved Dr. Paskon for active Medical Staff privileges on April 17, 1989, the Board neither terminated his summary suspension nor approved his reappointment to the active Medical Staff.

Thus, a travesty of justice has befallen Dr. Paskon. The suspension of his Medical Staff privileges for failing to have a DEA license (a license that was issued four (4) days after the summary suspension was imposed), has turned into a ban on Dr. Paskon's ability to practice medicine in the only hospital in Dent County, where he has practiced since 1974. That "temporary" suspension has now lasted more than two (2) years.[8] Dr. Paskon has not yet been tendered a proper hearing before the Executive Committee of the Medical Staff. The stated basis of the summary suspension, failure to have a DEA license, is not contained in the Medical Staff Bylaws. Dr. Paskon has been deprived of his constitutionally protected right of due process by the arbitrary and unreasonable imposition by the Board of Directors of a summary suspension on grounds neither provided for in the summary suspension provisions of the Medical Staff Bylaws nor supported by the stipulated facts in this case.

(Footnote 7 Continued)

summary suspension. At such a hearing, Dr. Paskon would have shown that he had a current and valid federal narcotics license. Such proof would have wholly negated the stated basis of the summary suspension. Accordingly, Dr. Paskon suggests that the summary suspension would have ended on April 17, 1989.

[8] Although not part of the record, the SMHD Board of Directors on July 22, 1991, granted Dr. Paskon provisional Active Medical Staff privileges, subject to various conditions or limitations. A copy of Mr. Pryor's letter of July 23, 1991 to Dr. Paskon, is included in the Appendix at A-68.

B. The Trial Court's Finding of an "Automatic" Suspension and Denial of Dr. Paskon's Right to a Hearing Before the Medical Staff Executive Committee Was Arbitrary and Unreasonable.

In its Order dated January 19, 1990, the trial court held that "Seth Paskon was *automatically* suspended on February 27, 1989" (emphasis added). That conclusion is without evidentiary support, misstates the evidence, and misapplies the Medical Staff Bylaws, Rules and Regulations of the Hospital. Moreover, such a conclusion is so far afield from the facts of this case as to result in an arbitrary and unreasonable denial of Dr. Paskon's right to due process.

As a result of an investigation by the Missouri Board of Registration for the Healing Arts, Dr. Paskon on April 1, 1988, entered into a stipulation and probation agreement, pursuant to which, as of April 1, 1988, his Missouri medical license was placed on probation for a period of three (3) years, retroactive to September 12, 1987. The trial court ruled that the Medical Staff Bylaws, Rules and Regulations governing automatic suspensions were self-executing. Thus, any automatic suspension would have been effective on April 1, 1988, retroactive to September 12, 1987. Despite that, the trial court held that the automatic suspension occurred on February 27, 1989, a full eleven (11) months after the probation agreement was entered into with the State Board for Registration of the Healing Arts, and seventeen (17) months after the effective date of Dr. Paskon's probation. This clearly demonstrates the complete mischaracterization by the trial court of the action taken by the Board of Directors of the Hospital.

The facts and circumstances surrounding the summary suspension of February 27, 1989 indicates that the trial court's categorization of this action as an automatic suspension is arbitrary and capricious.

As discussed, *supra*, the effective date of the suspension, February 27, 1989, indicates that it was other than automatic. The trial court relied on Article VII, Section III(a) of the Hospital's Medical Staff Bylaws, Rules and Regulations as the basis for its determination that an automatic suspension occurred. That section indicates that an automatic suspension occurs immediately when a practitioner is being placed on probation by the State Board for Registration of the Healing Arts. Dr. Paskon's suspension was imposed by the Board's action on February 27, 1989, eleven (11) months after an automatic suspension would have been effective.

Secondly, at no time was the probationary status of Dr. Paskon's license ever discussed in connection with the suspension that was levied against him by the Board of Directors. The minutes of the February 27, 1989 Board of Directors meeting clearly state that the suspension was made for other reasons:

> A motion was made by Jim Hocker, seconded by Dennis Fiebelman that the Board suspend the privileges of Dr. Seth Paskon as of 2/27/89 (10:45 p.m.) *for failure to have a current and valid federal narcotics license, pursuant to the summary suspension* provisions of the Medical Staff Bylaws. (emphasis added)

At no time was Dr. Paskon's probationary status mentioned in connection with his summary suspension. Additionally, a month prior to the meeting in which this summary suspension took place, the Medical Staff unanimously voted to renew Dr. Paskon's staff privileges despite their actual knowledge of his probationary status with the Board of Registration for the Healing Arts. Finally, the Board granted Dr. Paskon temporary privileges effective March 3, 1989, an act they were powerless to do if Dr. Paskon was truly on automatic suspension.

The trial court ruled that the February 27, 1989 action by the Board merely formalized the automatic suspension already in

place. This ruling is wholly erroneous. It is clear that none of the Board's actions contemplated an automatic suspension under Article VII, Section III(a) of the Hospital's Medical Staff By-laws, Rules and Regulations because no such suspension was ever in effect. Notwithstanding these facts, the trial court erroneously declared that Dr. Paskon had been automatically suspended.

The Hospital's Board did not consider Dr. Paskon's suspension to be automatic. The issue of an automatic suspension was never discussed, raised, or even contemplated until counsel for the Hospital filed a memorandum to the trial court in January of 1990, for the first time raising the question that there may have been an automatic suspension. The trial court seized upon this *post hoc* argument to rationalize an act which occurred nearly a year prior and for completely different reasons.

In *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156 (1962), this Court considered the question of *post hoc* rationalization for actions taken by an administrative agency. The Court found:

> [A] simple but fundamental rule of administrative law . . . is that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action . . . .

371 U.S. at 169 (quoting *Securities and Exchange Commission v. Chenery Corp.*, 332 U.S. 194 (1947)).[9]

---

[9] This Court went on to hold that: ". . . courts may not accept appellate counsel's *post hoc* rationalizations for agency action." 371 U.S. at 168. It is submitted that the rule set forth in *Burlington* is a necessary corollary to the

(Footnote 9 continued on next page)

The trial court herein has done exactly that which this Court has forbidden. It has selected its own grounds, as suggested by defendants' counsel in a *post hoc* memorandum, upon which to justify the Board of Directors' action when in fact the Board's grounds were clearly stated and completely different from those upon which the trial court relied. The trial court has completely recategorized a summary suspension under Article VII, Section II(a), as indicated by the Board, as an automatic suspension under a completely different section, thereby eliminating the appellate review to which Dr. Paskon was entitled. Because the trial court characterized Dr. Paskon's suspension as "automatic" rather than "summary", it found that Dr. Paskon ". . . is entitled to no review or appeal upon automatic suspension" under the Medical Staff Bylaws.

Not only is there a complete dearth of evidence that would suggest in any way that the suspension levied against Dr. Paskon was automatic, it is in fact clear in the record that the intent of the Board, the body that levied such suspension, that the suspension be summary in nature and that Dr. Paskon be entitled to a hearing to appeal the summary suspension. In the minutes of the February 27, 1989 meeting during which the suspension was levied, there is a clear an unequivocal indication that the suspension was summary. Furthermore, in the minutes the Board goes on to state that "Dr. Paskon was informed that he could make a request to the Medical Staff for a hearing concerning the suspension."[10] The trial court has held that Dr. Paskon's suspension

---

(Footnote 9 Continued)

doctrine of primary jurisdiction, which is recognized by Missouri courts. *See, e.g., State ex rel Cirese v. Ridge*, 138 S.W.2d 1012, 1014 (Mo. banc 1940); *In re Estate of Dothage*, 727 S.W.2d 925 (Mo. Ct. App. 1987).

[10] These discrepancies point to the unmistakable fact that the Board fashioned their own remedy despite the Medical Staff Bylaws, Rules and Regulations. Those Bylaws specifically stated that summary suspension (defined in Article VII, Section II of the Medical Staff Bylaws, Rules and Reg-

(Footnote 10 continued on next page)

was automatic, and therefore not subject to hearing review. This flies directly in the face of the intent of the Board which levied the suspension as evidenced by the notice given to Dr. Paskon that he was in fact entitled to a hearing by the Medical Staff.

Furthermore, the actions of the Board and other Hospital authorities from and after Dr. Paskon's entry into the stipulation and probation agreement, are totally inconsistent with the notion of an automatic suspension.

After the Hospital became aware that Dr. Paskon's license to practice medicine was on probation, it took the following actions, each of which is inconsistent with and at odds with the trial court's ruling that an "automatic suspension" occurred on February 27, 1989:

1. On January 23, 1989, Dr. Paskon's Medical Staff privileges were renewed.

2. On February 27, 1989, Dr. Paskon was summarily suspended.[11] There was no mention of the probation agreement which purportedly constituted the basis for an automatic suspension. The avowed reason for the summary suspension was the ". . . failure to have a current and valid federal narcotics license . . ."

(Footnote 10 Continued)

ulations), unequivocally the action levied against Dr. Paskon, was only to be used in situations where there was concern for adequate patient care. In short, a summary suspension is used in matters regarding professional competence. This has never been suggested in relating to Dr. Paskon's suspension. In fact, it was stated by the Board that Dr. Paskon's summary suspension was for his failure to have a current DEA license—a credentials matter, not a patient care matter.

[11] Of course, if Dr. Paskon's privileges had been automatically suspended, there would have been no need for the summary suspension levied on February 27, 1989.

3. Dr. Paskon was informed by the Board ". . . that he could make a request to the Medical Staff for a hearing contesting the suspension."

4. On March 3, 1989, Dr. Paskon received his federal narcotics license number from the DEA, and that same day he was granted temporary privileges at the Hospital.

5. On March 20, 1989, Dr. Paskon reapplied for staff privileges and his request was sent to the Medical Staff Executive Committee with specific reference to the fact that Dr.Paskon still had temporary privileges until June 1, 1990.

6. On April 17, 1989, the Executive Committee of the Medical Staff met and unanimously approved Dr. Paskon's application for reappointment to the Medical Staff. After that vote, the entire active Medical Staff again unanimously agreed that Dr. Paskon should be granted active Medical Staff privileges.

The Hospital's actions were completely inconsistent with the notion that Dr. Paskon's privileges were "automatically suspended" when he entered into the stipulation and probation agreement with the Board of Registration for the Healing Arts.

Finally, the trial court further arbitrarily and capriciously deprived Dr. Paskon of his due process rights by failing to order his reinstatement. The record is clear that on June 23, 1989, that Board entered an Early Termination of Probation Order, and Dr. Paskon's license to practice medicine was restored fully and completely. If, as the trial court has erroneously found, the suspension of Dr. Paskon's Medical Staff privileges at the Hospital was automatic as of the date of his probation, then likewise, the trial court should have found that said suspension was automatically lifted when the Board of Registration entered

its Early Termination Order. There is nothing in the Medical Staff Bylaws, Rules and Regulations that would prevent the trial court from entering such an order. Once the trial court found the suspension to be automatic, it should have considered the evidence before it as to the end of Dr. Paskon's probation and ordered the immediate reinstatement of his Medical Staff privileges not later than as of June 23, 1989, the date his probation ended.

The Opinion of the Court of Appeals, upholding Dr. Paskon's summary suspension and the continuation thereof, further demonstrates that such suspension and its continuation was arbitrary and unreasonable.

The Court of Appeals determined that it was its duty to affirm the trial court, even if that court's judgment was based on the wrong reasons:

> The judgment of the trial court is to be sustained if the Board had the authority to suspend the privileges of the plaintiff *because he had no federal narcotics license.*

806 S.W.2d at 421 (emphasis added).[12] In searching the record for reasons to affirm the trial court, the Court of Appeals seized on the authority of the Hospital's Board of Directors to govern the Hospital. 806 S.W.2d at 422-423. The Court of Appeals held that since the Board had "ultimate authority" to govern the Hospital, "(t)he Board had authority to approve or to *temporarily* suspend the privileges of the plaintiff . . ." 806 S.W.2d at 423 (emphasis added).[13]

---

[12] As discussed above, the trial court based its decision on Dr. Paskon's probationary status with the Board of Registration for the Healing Arts, not on his failure to have his federal narcotics license.

[13] The Medical Staff Bylaws make no provision for a "temporary" suspension of a physician. However, as discussed, *infra*, the effect of the Opinion of the Court of Appeals is to render Dr. Paskon's suspension anything but "temporary."

The Court of Appeals then determined that Dr. Paskon was not entitled to a hearing before the Medical Staff Executive Committee:

> The Board approved the medical staff's recommendation that the plaintiff be granted privileges for 1989 pending receipt of his federal narcotics license. Such a hearing was not required when the plaintiff admitted he had not received and did not have a federal narcotics license required as a requisite to practicing in the hospital.

806 S.W.2d at 423. This rationale of the Court of Appeals is baseless. Dr. Paskon never made such an admission. On February 27, 1989, Dr. Paskon informed the Medical Staff Executive Committee that he had applied for his DEA license and that it had been approved, but that he did not yet have physical possession of the license. In fact, Dr. Paskon received his DEA license four (4) days later.

In light of the foregoing, the Court of Appeals' refusal to consider "subsequent contacts" between Dr. Paskon and the Hospital is arbitrary and unreasonable.[14] Such subsequent contacts between Dr. Paskon and the Hospital Board and Administrator demonstrate that:

1. Dr. Paskon received his federal narcotics license within four (4) days of the purported summary suspension by the Board, in fact, on March 3, 1989;

---

[14] "The voluminous record reflects subsequent contacts between the plaintiff and the hospital administrator and the Board concerning the grant of temporary privileges to the plaintiff and for reappointment to the active staff. However, consideration of the plaintiff's four points on appeal do not require a summary or a restatement of the evidence concerning such subsequent contacts." 806 S.W.2d at 421.

2. Even though Dr. Paskon received his federal narcotics license, the Board would not terminate the purported summary suspension; and

3. Even though the Medical Staff unanimously approved Dr. Paskon for active Medical Staff privileges in April of 1989, the Board would not approve such appointment or reappointment to the active Medical Staff.

4. Dr. Paskon's probationary status with the Board of Registration for the Healing Arts was terminated on June 23, 1989.

The Court of Appeals' failure to consider these "subsequent contacts" has resulted in the arbitrary, capricious and unreasonable continuation of Dr. Paskon's "temporary" suspension for a period in excess of two (2) years when the justification for such suspension relied on by the Court of Appeals, *i.e.*, Dr. Paskon's failure to possess a valid and current federal narcotics license, disappeared four (4) days after the suspension of Dr. Paskon's privileges. Thus, the continuation of Dr. Paskon's suspension is arbitrary, capricious and unreasonable and the refusal of the Court of Appeals to consider this record has deprived Dr. Paskon of his Medical Staff privileges without due process of law for a period exceeding two (2) years.

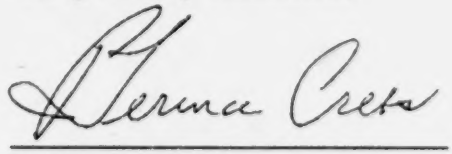
CONCLUSION

For the reasons set forth above, Petitioner Seth C. Paskon, M.D., has been denied his rights to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution. His summary suspension was imposed for a reason not set forth in the Medical Staff Bylaws, failure to have a valid and current federal narcotics license, which does not affect patient care (the only stated justification for a summary suspension) or Dr. Paskon's ability to prescribe controlled substances under the Hospital's DEA license. The Hospital's Board further

arbitrarily and capriciously denied Dr. Paskon the hearing by the Medical Staff Executive Committee to which he was entitled under the Medical Staff Bylaws. The Circuit Court of Reynolds County exacerbated the denial of Dr. Paskon's due process rights by finding, without any justification whatsoever in the record, that Dr. Paskon's suspension was "automatic" and consequently that Dr. Paskon was not entitled to review or appeal of his suspension. This holding, as affirmed by the Missouri appellate courts, has resulted in Dr. Paskon's exclusion from the only hospital in Dent County for over two (2) years without a hearing, notwithstanding that the stated reasons for his summary suspension, failure to have a valid and current DEA license, was removed by his obtaining such license on March 3, 1989, and the trial court's justification for its finding of an automatic suspension, Dr. Paskon's probation agreement with the Missouri Board of Registration for the Healing Arts, disappeared with the entry of that Board's Early Termination Order on June 23, 1989.

For these reasons, Petitioner Seth C. Paskon, M.D., respectfully requests that this Court issue its writ of certiorari to the Missouri Court of Appeals, Southern District.

Respectfully submitted,



P. Terence Crebs
HERZOG, CREBS & McGHEE
555 Washington Avenue
Sixth Floor
St. Louis, Missouri 63101
(314) 231-6700

Attorneys for Petitioner

CERTIFICATE OF SERVICE

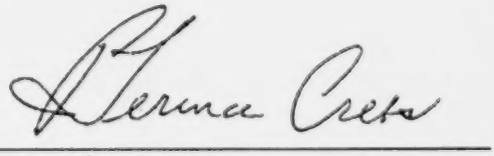
I hereby certify that three (3) copies of the foregoing were mailed first class, postage prepaid, to:

William Camm Seay, Esq
Wilkerson and Seay
209 E. Fourth Street
P.O. Box 418
Salem, Missouri 65560

David G. Neal, Esq.
Neal & Oberzalek Law Firm, P.C.
P.O. Box 398
Eminence, Missouri 65466

Attorneys for all Respondents

this 1st day of August, 1991.



APPENDIX

APPENDIX A

In the Supreme Court of Missouri

No. 73628
S.D. No. 16879

May Session, 1991

Seth C. Paskon, M.D.,
Plaintiff-Appellant,
vs. (TRANSFER)
Salem Memorial Hospital District, et al.,
Defendants-Respondents.

Now at this day, on consideration of plaintiff-appellant's application to transfer the above-entitled cause from the Southern District Court of Appeals, it is ordered that the said application be, and the same is hereby denied.

STATE OF MISSOURI-Sct.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the May Session thereof, 1991, and on the 3rd day of May, 1991, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson, this 3rd day of May, 1991.

/s/ Thomas F. Simon, Clerk
_____D.C.

APPENDIX B

Missouri Court of Appeals
Southern District
Division One

No. 16879

SETH C. PASKON, M.D.,
Plaintiff-Appellant,

vs.

SALEM MEMORIAL HOSPITAL DISTRICT; GEORGE BAY, JUDY THOMPSON, GARY PLANK, JIM HOCKER, FERN HIGHLEY and DENNIS FIEBELMAN, as the Directors of the Salem Memorial Hospital District; JUDY THOMPSON, GARY PLANK and JOHN DEMORLIS, M.D., as Members of a Purported Hearing Committee of the Salem Memorial Hospital District; and JOHN DEMORLIS, M.D., TED C. TANG, M.D., and CHARLES CUNNINGHAM, D.O., as the Members of the Executive Committee of the Medical Staff of the Salem Memorial Hospital District,
Defendants-Respondents.

Filed: March 11, 1991

ON PLAINTIFF'S MOTION FOR REHEARING OR TO TRANSFER TO SUPREME COURT

PER CURIAM:

Plaintiff, Seth C. Paskon, has filed a motion for rehearing or transfer with extensive suggestions. The purpose of and limitations upon the content of such a motion are set forth by Rule 84.17. The fundamental precept is found in the first sentence of that Rule. "A motion for rehearing shall briefly and distinctly state the grounds upon which a rehearing is sought." Such a

motion is not properly used to reargue issues determined by an opinion. *Ackerman v. Globe-Democrat Publishing Company*, 368 S.W.2d 469 (Mo. 1963), *cert. denied*, 375 U.S. 949, 84 S. Ct. 353, 11 L.Ed.2d 276 (1963).

The instant motion violates both the spirit and the letter of Rule 84.17. It not only reargues the plaintiff's appeal, but id does so in an unacceptable manner.

First, it premises the reargument on an unwarranted attack upon the integrity and the motives of the members of the Board of Directors and its attorney. The attack will not be set forth at length. It is sufficient to observe it concludes with the following. "Seizing on the fact that the Appellant had not yet received his federal narcotics license, the Board manufactured grounds which, on their face, appeared to legitimize its purported summary suspension action." This attack upon the members of the Board, who serve without compensation, is unsupported by the record. Such an untimely, ill-founded, scurrilous attack has no place in a motion for rehearing.

Second, the plaintiff's reargument primarily consists of a series of conclusory characterizations of alleged errors in the opinion. At first blush, those allegations collectively present a facade of significance which vanishes upon analytical examination of each assertion. Examples of such allegations will be mentioned. The motion alleges "That Opinion contains erroneous factual findings upon which the Court relied in formulating its conclusions." Upon examination, the plaintiff's assertions of specific erroneous factual findings are without merit. For example, referring to the opinion's use of the term "temporary suspension," the plaintiff charges "this Court goes out of its way to create this new category of suspension . . . and thereby permits the Board to bypass the hearing procedures set forth in its Bylaws and mandated by the requirements of due process." This court's reference to a "temporary" suspension is an acknowledgment of

the inherent meaning of the term "suspension", as distinguished from "termination." One accepted meaning of suspension is "temporary removal from office or privileges." Webster's New Collegiate Dictionary (1977). The Board did not bypass its bylaws which contain no provision for a hearing. It did tender the plaintiff the hearing called for by the Medical Staff Bylaws. This charge is vacuous.

A further example is the plaintiff's argument the Board unconditionally reappointed him to the medical staff for 1989. Whether or not that is the case, does not alter the result. Even if the plaintiff was unconditionally reappointed, the Board had authority to terminate the plaintiff's privileges upon his disqualification under the Medical Staff Bylaws. Nonetheless, this is an instance of the plaintiff's assertion of his interpretation of the evidence to be unquestioned fact. The minutes evidencing plaintiff's reappointment to the medical staff, include the following: "A motion was made by Judy Thompson *to accept the medical staff's recommendation* to reappoint the above stated physicians to the medical staff for the year 1989". (Emphasis added.) That recommendation was for approval "pending receipt of copies of federal licenses of Doctors . . . and Paskon."

The plaintiff also argues the action of the Board was invalid because "Administrative Procedures Must Be Followed." In an attempt to limit the authority of the Board of Directors, he quotes a portion of the bylaws of the Board of Directors. "That Bylaw provides *inter alia*: '. . . except as limited by these bylaws *or by the specific instructions of the Board of Directors*.' Such specific instructions are contained in the Medical Staff Bylaws which were approved by the Board."

The bylaw of the Board of Directors so quoted and relied upon by the plaintiff is taken completely out of context. The portion of those bylaws quoted is a limitation upon the power of the "Executive Committee" of the Board of Directors.

The nature and scope of the authority of the Board of Directors is stated in the principal opinion and will not be repeated. The recognition of that authority is scarcely novel.

> "As to every physician, podiatrist and dentist admitted to practice in the hospital, the board of trustees is the supreme governing authority of the hospital and admission to practice is conditioned upon authorization by the board. Section 205.195. The board of trustees as the governing body of the hospital is the supreme legal authority in the hospital. 13 CSR 50-20.030(1)(A)(3). [Rescinded November 11, 1982—Replaced by 13 CSR-50-20.021 effective November 11, 1982.]" *Long v. Bates County Memorial Hosp.*, 667 S.W.2d 419, 424 (Mo. App. 1983).

The plaintiff's motion concludes with a further attack upon the Board of Director's attorney and an allegation of fundamental error by this court. "Again maneuvering for a substantive position, the Board's attorney, with full knowledge that the Board had approved the Bylaws, the consequences of which it was trying desperately to avoid, grasped on to the straw of the Board's ultimate authority to govern the Hospital. As inequitable and shocking as this result is, the Court herein has allowed this to stand by applying the wrong standard of review to this case."

To support this claim, plaintiff again cites cases noted in the opinion to limit the scope of review by the trial court and this court. Those cases deal with the direct judicial review of "contested cases" heard and determined by an administrative agency. The limitations upon such direct judicial review are complex and can be understood only by a thorough study of those cases. Those limitations, which are subject to exception, are generally recognized in this state. *Mills v. Federal Soldiers Home*, 549 S.W.2d 862 (Mo. banc. 1977). However, the limitations applicable to the direct judicial review of a contested case need not be further considered.

The plaintiff has failed to distinguish the direct judicial review of a "contested case" from the review, in an independent judicial proceeding, of an agency decision in an "uncontested case". Cf. §§ 536.140 and 536.150. The significant differences in procedure and the scope of review between "contested" and "uncontested" cases before an administrative agency are discussed in *Benton-Hecht Moving & Storage v. Call*, 782 S.W.2d 668 (Mo. App. 1989). See also Ch. 8, Adjudication—Introduction—Definition, and Ch. 12, Adjudication—Judicial Review. 20 Missouri Practice, Administrative Practice & Procedure, (Neely & Shinn) (1986).

The plaintiff's petition for a declaratory judgment and injunction was filed more than 30 days after notice of the administrative decision. If the suspension of the plaintiff's privileges was a "contested" case, the circuit court and this court had no jurisdiction and the plaintiff's appeal should have been dismissed. *State ex rel. St. Louis County v. Enright*, 729 S.W.2d 537 (Mo. App. 1987).

But, that suspension was an "uncontested" case. *Long v. Bates County Memorial Hosp.*, supra. The record before the trial court consisted of exhibits and depositions. That is the record before this court.

> "The action before the Board was an *uncontested* case, thus judicial review is prescribed by § 536.150, RSMo 1978 (formerly § 536.105). . . .
>
> . . .
>
> A judgment entered pursuant to § 536.150 is essentially the same as any other judgment declared in a court-tried case. . . ." *Long* at 421, 422 (Emphasis in original).
>
> "The judgment the circuit court renders under § 536.150 and Rule 100.08, albeit distinctive in subject matter and therefore in scope, is of the essential quality of other

> judgments declared in a case tried to the court without a jury." *Phipps v. School Dist. of Kansas City*, 645 S.W.2d 91, 96 (Mo. App. 1982).

The rule applicable to cases tried to the court is, "we must affirm the trial court if its ruling was properly for any reason, even if the grounds assigned were wrong." *Arthur v. Jablonow*, 665 S.W.2d 364, 365 (Mo. App. 1984). While the reason assigned by the trial court was proper, that judgment could have rested on a number of valid reasons, as noted in the opinion. The judgment of the trial court did not erroneously declare or apply the law and was supported by the evidence. The motion for rehearing or transfer is denied.

ALL CONCUR.

APPENDIX C

Missouri Court of Appeals
Southern District
Division One

No. 16879

SETH C. PASKON, M.D.,
Plaintiff-Appellant,

vs.

SALEM MEMORIAL HOSPITAL DISTRICT; GEORGE BAY, JUDY THOMPSON, GARY PLANK, JIM HOCKER, FERN HIGHLEY and DENNIS FIEBELMAN, as the Directors of the Salem Memorial Hospital District; JUDY THOMPSON, GARY PLANK and JOHN DEMORLIS, M.D., as Members of a Purported Hearing Committee of the Salem Memorial Hospital District; and JOHN DEMORLIS, M.D., TED C. TANG, M.D., and CHARLES CUNNINGHAM, D.O., as the Members of the Executive Committee of the Medical Staff of the Salem Memorial Hospital District,
Defendants-Respondents.

Filed: January 28, 1991

APPEAL FROM THE CIRCUIT COURT
OF REYNOLDS COUNTY

Honorable Donald E. Lamp, Associate Circuit Judge

AFFIRMED

The defendants in this declaratory action are Salem Memorial Hospital District (District), members of the Board of Directors of the District (Board), members of the "hearing committee" of the Board, and members of the executive committee of the medical staff of the District hospital. On February 27, 1989, the

Board of Directors suspended plaintiff Seth C. Paskon, M.D., as an active member of the medical staff of the District's hospital "for his failure to have a current and valid federal narcotics license." By Count I, the plaintiff first seeks a declaration that we was not effectively suspended "because the motion and vote taken to so suspend the plaintiff was done while the board of directors . . . was in executive session in violation of RSMo 610.015 (1986)" and because the bylaws of the medical staff authorized the Executive Committee of the Board but not the entire Board to summarily suspend such privileges. In the alternative, in the event such relief is denied, the plaintiff seeks a declaration that he should be afforded a hearing by the executive committee of the hospital's medical staff as provided by Article VII, Section II b. of the "Medical Staff Bylaws". By Count II, the plaintiff seeks an order compelling the executive committee of the medical staff to hold such a hearing.

The trial court found that, at the time of the suspension, the plaintiff had been placed on probation by the Missouri Board of Registration for the Healing Arts and that under the bylaws of the medical staff, that action automatically suspended all of the plaintiff's hospital privileges. The trial court further found that the Board of Directors merely formalized that automatic suspension and that the plaintiff was not entitled to a hearing. In response to an argument of the plaintiff, the trial court found that the Board may temporarily suspend a member of the medical staff under the provisions of Article VII, Section II a. Finally, the trial court found that because plaintiff was required to perform emergency room services for compensation paid by the District, he was an "employee" of the District within the meaning of § 610.021 and the Board was permitted to take the action that it did in a closed session. The plaintiff appeals. The following is an outline of the relevant statutes, bylaws and facts.

By statute, the District acts through and is governed by its Board of Directors. § 206.100. The organization of the Board

and its powers are also defined by statute. *Id.* The bylaws adopted by the Board include the following provision for an Executive Committee:

"ARTICLE V

COMMITTEES OF THE BOARD OF DIRECTORS

***

2. The Executive Committee shall consist of the Chairman, Vice-Chairman, and Secretary of the Board of Directors. The Executive Committee shall have power to transact all regular business of the hospital during the interim between the Meetings of the Board of Directors, except as limited by these bylaws or by the specific instructions of the Board of Directors. The Executive Committee shall report at the next Board of Directors meeting all actions taken by said committee, for ratification by the Board of Directors; said actions shall be recorded in the minutes of the Board of Directors."

***

The organization of the professional staff and control of who may practice in the hospital is also governed by statute.

> "The professional staff of the hospital shall be an organized group which shall initiate and, with the approval of the board, adopt bylaws, rules, regulations, and policies governing professional activities in the hospital. General practitioners may practice in the hospital in accordance with their competence as recommended by the professional staff and as authorized by the board." § 206.105.2.

The professional medical staff of the hospital has adopted, and amended from time to time, comprehensive and detailed bylaws.

Those bylaws include provisions prescribing the organization of the medical staff, the qualifications required of those permitted to practice in the hospital, and the procedure for the initial appointment and the required annual reappointment to the medical staff. Those bylaws require for appointment and reappointment to the active medical staff "proof of BNDD license number, State of Missouri, and federal narcotic license number and that it is current."

The bylaws also contained a series of provisions concerning the evaluation of services provided by members of the professional staff and for the termination or suspension of privileges to practice in the hospital. Article VII, Section I, of the Medical Staff Bylaws provides for "Procedure" for corrective action whenever the professional conduct of any practitioner is considered lower than the standards of the medical staff, or disruptive to the operations of the hospital. Article VII, Section II, deals with "Summary Suspension" of the privileges of a practitioner. The provisions of "SECTION II. SUMMARY SUSPENSION", include the following:

"a. Any one of the following —chairman of the executive committee, the president of the medical staff, the chief executive officer, the executive committee of either the medical staff or the governing body—shall each have the authority, whenever action must be taken immediately in the best interest of patient care in the hospital, to summarily suspend all or any portion of the clinical privileges of a practitioner, and each summary suspension shall become effective immediately upon imposition.

b. A practitioner whose clinical privileges have been summarily suspended shall be entitled to request that the executive committee of the medical staff hold a hearing on the matter within such reasonable time

period thereafter as the executive committee may be convened in accordance with Article VIII of these bylaws."

Article VII, Section III, "*AUTOMATIC SUSPENSION*" provides:

"a. Action by the State Board of Medical Examiners revoking or suspending a practitioner's license, or placing him upon probation, shall automatically suspend all of his hospital privileges."

* * *

Article VIII deals with "Hearing and Appellate Review Procedure". The substantive provisions of that article defining the right to an procedure for review are as follows:

"SECTION I. *RIGHT TO HEARING AND APPELLATE REVIEW*

a. When any practitioner receives notice of a recommendation of the executive committee that, if ratified by decision of the governing body, will adversely affect his appointment to or status as a member of the medical staff or his exercise of clinical privileges, he shall be entitled to a hearing before an ad hoc committee of the medical staff. If the recommendation of the executive committee following such hearing is still adverse to the affected practitioner, he shall then be entitled to an appellate review by the governing body before the governing body makes a final decision on the matter.

b. When any practitioner receives notice of a decision by the governing body that will affect his appointment to or status as a member of the medical staff or his exercise of clinical privileges, and such decision is not

> based on prior adverse recommendation by the executive committee of the medical staff with respect to which he was entitled to a hearing and appellate review, he shall be entitled to a hearing by a committee appointed by the governing body, and if such hearing does not result in a favorable recommendation, to an appellate review by the governing body, before the governing body makes a final decision on the matter."

Subsequent sections contain detailed provisions concerning the procedure and necessity of a request for a hearing and the conduct of such a hearing.

Plaintiff first became a member of the active medical staff of the hospital in 1974. On April 1, 1988, the plaintiff and the Missouri Board of Registration for the Healing Arts entered into an agreement that placed the plaintiff's license to practice medicine on probation from September 12, 1987 to September 11, 1990.

The plaintiff's application for his 1989 reappointment to the active medical staff was first considered by the "credentials committee" of the medical staff on January 16, 1989. That committee noted that the plaintiff did not have a federal narcotics license for 1989. A member of the committee was designated to contact the plaintiff concerning that deficiency. This was followed on January 16, 1989 by a meeting of the medical staff. The minutes of that meeting include the following:

> "Dr. Demorlis reported that the medical staff executive committee had met and reviewed reappointment documentation for all staff physicians. All were approved *pending receipt* [of] copies *of federal licenses for . . . Paskon.* A motion was made by Dr. Carnett and seconded by Dr. Farquhar to approve the following for active, medico-administrative, and courtesy staff:". (Emphasis added.)

The plaintiff was included in the list of doctors so approved for the active staff. At its regular meeting on January 23, 1989, the Board accepted the medical staff's recommendation for reappointment for 1989.

At the regular meeting of the medical staff on February 20, the plaintiff reported that he had not yet received his federal narcotics license. The Chief of the Medical Staff then suggested that the plaintiff meet with the Board on February 27, 1989 "explaining his status with the DEA and reasons why he does not have a current federal license."

The plaintiff and his lawyer attended and participated in the regular meeting of the Board on February 27, 1989. Through his lawyer, the plaintiff reported that he had applied for but had not received his federal narcotics license. Following a discussion, the action of the Board is reflected in the minutes:

> "A motion was made by Jim Hocker, seconded by Dennis Fiebelman that the board suspend the privileges of Dr. Seth Paskon as of 2/27/89 (10:45 p.m.) for his failure to have a current and valid federal narcotic license, pursuant to the summary suspension privileges [sic] of the medical staff bylaws. A voice vote was taken: Jim Hocker-Yes; Dennis Fiebelman-Yes; Fern Highley-Yes; Gary Plank-No and Judy Thompson-Yes. A majority of the Executive Committee voted to approve the suspension."

On March 27, 1989, the plaintiff, by a letter to the Chief of the Medical Staff, requested that the executive committee of the medical staff "conduct a hearing on the summary suspension purportedly issued by the Board of Directors . . . ." In response, the Board appointed a hearing committee in accordance with Article VIII, Section I b. of the Medical Staff Bylaws. This committee scheduled a hearing for April 17, 1989 at 8 a.m., and advised plaintiff of his right to appear. On the advice of his lawyer, the plaintiff did not appear. The administrator of the

hospital then advised the plaintiff that, in accordance with Article VIII, Section V c., he had waived his right to a hearing and was deemed "to have accepted the adverse recommendation or decision involved."

The voluminous record reflects subsequent contacts between the plaintiff and the hospital administrator and the Board concerning the grant of temporary privileges to the plaintiff and for reappointment to the active staff. However, consideration of the plaintiff's four points on appeal do not require a summary or a restatement of the evidence concerning such subsequent contacts.

The plaintiff's first two points are interrelated. His first point is that the trial court erred in denying relief based upon a finding that the plaintiff's privileges had been "automatically" suspended by reason of his medical license having been placed upon probation by the Missouri Board of Registration for the Healing Arts. The plaintiff bases this point upon the proposition that the board of directors, as an administrative agency, temporarily suspended plaintiff's privileges because he had no federal narcotics license and that such action cannot be sustained on a different basis. He cites *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 83 S. Ct. 239, 9 L.Ed.2d 207 (1962).

It is not necessary for the disposition of this appeal to consider if the general principle stated in *Burlington* limits the authority of a trial court in an indirect attack upon the action of a board, as distinguished from direct judicial review of the action of a board. The judgment of the trial court is to be sustained if the Board had the authority to suspend the privileges of the plaintiff because he had no federal narcotics license. *Johnston v. Bates*, 778 S.W.2d 357 (Mo. App. 1989).

The plaintiff's second point is

> "The trial court erred in upholding the vote by the Board of Directors to suspend Dr. Paskon's medical staff privileges contrary to the medical staff bylaws, rules and regulations which specifically delegate that function to the Executive Committee of the Board not just the Board . . . ."

In making this point, and in responding to it, none of the parties refers to the last sentence in the paragraph concerning the suspension of plaintiff's privileges contained in the minutes of the meeting of the Board on February 27, 1989. That sentence reads: "A majority of the Executive Committee voted to approve the suspension." Since that sentence appears in the minutes of the Board, it is reasonable to conclude it refers to the Executive Committee of that Board. As noted, the bylaws of the Board creating the Executive Committee provide: "The Executive Committee shall report at the next Board of Directors meeting all actions taken by said committee, for ratification by the Board of Directors; said actions shall be recorded in the minutes of the Board of Directors." Considered in the light of that provision, the quoted sentence establishes that the Executive Committee of the Board did vote to suspend the plaintiff's privileges. The preceding part of that paragraph can be reasonably construed to mean that the Board ratified that suspension. The sentence can scarcely be considered as an inadvertent typing error. The three members of the Board constituting the Executive Committee attended the meeting of February 27, 1989. The minutes are signed by Gary Plank, Secretary/Treasurer, and George Bay, Chairman, two of the three members of that Executive Committee. In the absence of contrary evidence, a party is bound by evidence he introduces. *Citizens Discount and Investment Corp. v. Wood*, 435 S.W.2d 717 (Mo. App. 1968); *Hastings v. Chivetta Architects v. Burch*, 794 S.W.2d 294 (Mo. App. 1990). These minutes demonstrate the plaintiff's second point has no merit.

However, the effectiveness of the action of the Board in suspending the plaintiff's privileges need not rest upon that

basis. The plaintiff's position is that the bylaws of the medical staff restrict the power of the Board to govern who shall be accorded privileges of practicing in the hospital. Those bylaws do prescribe the qualifications and prerequisites necessary for professionals to be accorded privileges of practicing in the hospital. Those bylaws were approved by the Board. The plaintiff alleges that the reappointment of the plaintiff to the active medical staff "resulted in a contract being entered into between the plaintiff and defendant Salem Memorial District Hospital . . . the terms of which are set forth in the aforementioned medical staff bylaws . . . ." The defendant answers by admitting that such reappointment resulted in such a contract and "*that some of the terms* of the contract are set forth in the aforementioned medical staff bylaws, rules and regulations of defendant hospital, but denies that all of the terms of said contract are therein contained." (Emphasis added.) Perhaps that answer contemplates the fact that the power of the Board of Directors is not exclusively defined by those bylaws.

The general power of the board is expressly defined by statute. "The board of directors of a district shall possess and exercise all of its legislative and executive powers. . . ." 206.100.1. The specific power of the board to determine who may practice in the hospital is also expressly declared by statute. ". . . General Practitioners may practice in the hospital in accordance with their competence as recommended by the professional staff and *as authorized by the board.*" § 206.105.2. (Emphasis added.)

The fundamental power of the Board is recognized by the following portion of the "Preamble" to the bylaws of the medical staff.

> "WHEREAS, it is recognized that the medical staff is responsible for the quality of medical care in the hospital and must accept and discharge this responsibility, subject to the ultimate authority of the hospital governing body, . . ."

Those bylaws, adopted by the active medical staff, given the Executive Committee of the Board and other committees and individuals authority to summarily suspend the plaintiff's privileges. However, it is the general rule that the grant of authority to an executive committee of a board of directors does not deprive that board of its ultimate authority.

> "Moreover it is to be borne in mind that while a corporation may conduct its business through its president and other officers who are the agents of the corporation, the ultimate source of *all authority lies in the board of directors* who stand in the place of and for the individual stockholders, and in the sense of the control they exercise over corporate affairs may be said to actually constitute the corporation." *Federal Land Bank of St. Louis v. Bross*, 122 S.W.2d 35, 39 (Mo. App. 1938). (Emphasis added.)

The reservation of that ultimate authority is recognized by the section of the bylaws of the Board creating the Executive Committee, Article V, 2., which requires Board ratification of all actions of that committee.

Considered in the light of the statutes and bylaws of the Board, Article VII, Section II of the Medical Staff Bylaws "Summary Suspension", granting power to summarily suspend the privileges of the plaintiff to the Executive Committee, should be construed to recognize that the same power exists in the Board. If not so construed, that section does not deprive the Board of that power for two reasons. Nothing in the bylaws of the medical staff provides that the Board does not retain that power. Even if those bylaws purported to deprive the Board of that power, they would be ineffective to do so.

> "[T]he powers and duties mentioned in this subsection of the ordinance are placed in the mayor and the council and they *cannot by ordinance be delegated to others*. Therefore, Section 4(c) is in conflict with the statues insofar as it

> purports to delegate to the City Administrator any of the powers enumerated therein. *Pearson v. City of Washington*, 439 S.W.2d 756, 761 (Mo. 1969). (Emphasis added.)

The Board had authority to approve, or to temporarily suspend the privileges of the plaintiff and "effectively" did so. The plaintiff's second point has no merit.

The plaintiff's third point is that the trial court erred in holding that he was not entitled to a hearing by the executive committee of the medical staff as required by Article VII, Section II b. of the Medical Staff Bylaws. That provision, as well as the provisions concerning "Hearing and Appellate Review Procedure", Article VIII, Section I a. and b., have been quoted above. Article VII, Section II b. provides that upon a summary suspension of privileges, a practitioner is entitled to a hearing by the executive committee of the medical staff "in accordance with Article VIII". When those provisions are read in context, Article VII, Section II b. recognizes that a hearing by the executive committee of the medical staff is required when a temporary suspension is based upon a finding that is within the expertise of that committee. The Board approved the medical staff's recommendation that the plaintiff be granted privileges for 1989 pending receipt of his federal narcotics license. Such a hearing was not required when the plaintiff admitted he had not received and did not have a federal narcotics license required as requisite to practicing in the hospital. When any "decision by the governing body" affects a practitioner's "exercise of clinical privileges, and such decision *is not based on prior adverse recommendation* by the executive committee . . . he shall be entitled to a hearing by a committee appointed by the governing body . . . ." Article VIII, Section I b. (Emphasis added.) The plaintiff was tendered a hearing by such a committee and this third point is denied.

The plaintiff's fourth point is that the trial court erred in finding the plaintiff was an "employee" within the meaning of § 610.021(3)

of the "Sunshine Law". The relevant part of that subsection provides that a public governmental body may conduct a closed meeting relating to "[h]iring, firing, disciplining or promoting an employee of a public governmental body." The trial court based its finding upon the fact that all professionals accorded clinical privileges were required on prescribed shifts to staff the emergency room of the hospital. For this work, the plaintiff was paid by the hospital an hourly wage or compensation. The plaintiff argues he was not an employees, but an independent contractor. He cites the fact the District did not deduct withholding taxes from his compensation and did not pay FICA or FUTA based on that compensation. That action may or may not correctly reflect the plaintiff's status under the tax laws. It does not establish that the hospital is not responsible for the plaintiff's action when he is providing a service for the hospital at an hourly rate.

The term "employee" has many meanings. *Auto Owners Mut. Ins. Co. v. Wieners*, 791 S.W.2d 751 (Mo. App. 1990). The purpose of the "employee" exception is to encourage uninhibited discussion of the qualifications and conduct of one who acts on behalf of a public governmental body. To permit such discussion in a closed meeting inures to the benefit of both parties. As a member of the active staff, the plaintiff regularly renders service on behalf of and is paid by the District and is an "employee" within the meaning of § 610.021(3). That being so, it is not necessary to consider the legal effect of the presence and participation of the plaintiff and his lawyer at the meeting. Nor is it necessary to weigh all the circumstances, including that presence and participation, in determining the public interest in sustaining the validity of the action of the Board. § 610.027.4. The plaintiff's final point has no merit and the judgment is affirmed.

ALMON M. MAUS, PRESIDING JUDGE

PREWITT, J., concurs.
CROW, J., concurs.

APPENDIX D

IN THE CIRCUIT COURT OF REYNOLDS COUNTY, MISSOURI

Case No. CV789-71CC

Division No. 1

SETH C. PASKON, M.D.,
Plaintiff,

vs.

SALEM MEMORIAL HOSPITAL DISTRICT; GEORGE BAY, JUDY THOMPSON, GARY PLANK, JIM HOCKER, FERN HIGHLEY and DENNIS FIEBELMAN, as the Directors of the Salem Memorial Hospital District, JUDY THOMPSON, GARY PLANK and JOHN DEMORLIS, M.D., as Members of a Purported Hearing Committee of the Salem Memorial District Hospital; and JOHN DEMORLIS, M.D., TED C. TANG, M.D. and CHARLES CUNNINGHAM, D.O., As the Members of the Executive Committee of the Medical Staff of the Salem Memorial District Hospital,
Defendants.

Filed: January 19, 1990

JUDGMENT AND ORDER

Now on this 2nd day of January, 1990, this cause came on regularly to be heard. The parties stipulated to the admission of all depositions and exhibits and the cause was submitted upon the amended pleadings. The parties submitted briefs upon the issues submitted whereupon the cause was taken under advisement.

NOW, THEREFORE, The Court having considered the pleadings and evidence submitted finds as follows:

That on the date of the purported summary suspension of the Plaintiff, February 27, 1989, by the Defendant Board of Directors of Salem Memorial District Hospital, the Plaintiff was on probation by the State Board of Registration for the Healing Arts.

That R.S.Mo. 334.021 (1969) provides that the "board of medical examiners" shall be construed to mean the state board of registration for the healing arts.

That Article VII, Section III a. of the Salem Memorial District Hospital Medical Staff Bylaws provides that the placing of a practitioner on probation by the State Board of Medical Examiners shall automatically suspend all of the practitioner's hospital privileges. The Court further finds that said subsection of the medical staff bylaws is self-executing and no appeal or review is allowed by the bylaws.

That the action by the Defendant Board of Directors to suspend the Plaintiff on February 27, 1989, merely formalized the self-executing provisions of Article VII, Section III a. of the medical staff bylaws.

That the Defendant Board of Directors as a body may, by implication, summarily suspend a practitioner under Article VII, Section II, a. the Court thereby finding that the persons or bodies therein listed who may summarily suspend is not meant to exclude the entire board of directors.

That the issue of whether the Plaintiff was afforded his proper rights of review is moot by the finding of the Court that the Plaintiff was automatically suspended on February 27, 1989, by Plaintiff being on probation with the State Board of Registration for the Healing Arts as Plaintiff is entitled to no review or appeal upon automatic suspension.

That the statement of Plaintiff that he was required to perform emergency room services for pay as a condition of his active medical staff privileges demonstrates that he was an employee of

Defendant Salem Memorial District Hospital and therefore the Defendant Board of Directors was permitted, pursuant to R.S.Mo. 610.021 (1987) to discipline or suspend Plaintiff in a closed session.

The Defendant Board of Directors were in compliance with Chapter 610 R.S.Mo. and therefore Plaintiff is not entitled to an award of attorneys fees.

WHEREFORE, IT IS ORDERED AND ADJUDGED AS FOLLOWS:

That Plaintiff Seth Paskon was automatically suspended on February 27, 1989, and that the Plaintiff was not entitled to a review or appeal under the bylaws of the medical staff of the Defendant Salem Memorial District Hospital.

That Defendant Board of Directors did not act in violation of Chapter 610, R.S.Mo. (1987) by voting in executive session with regard to Plaintiffs medical staff privileges.

The costs, including the Defendants costs of taking Defendant's depositions are taxed to Plaintiff.

SO ORDERED: /s/ Donald E. Lamb,
Judge

APPENDIX E

Board of Directors Regular Meeting
EXECUTIVE SESSION
February 27, 1989
Page 2

DR. PASKON

DEA LICENSE — At 9:30 p.m. Seth Paskon, M.D. and his legal counsel, Austin Mitchell, were asked to enter the executive session meeting to discuss the status of Dr. Paskon's DEA license according to the medical staff bylaws rules and regulations.

Dr. Paskon stated that he has Austin Mitchell as his legal counsel present to help clarify matters. Mr. Mitchell stated that Dr. Paskon applied for his BNDD License on December 20, 1988 and applied for his DEA license on December 23, 1988. The BNDD was received on January 9, 1989, but he is still waiting on the DEA to issue federal license. He has contacted Jean Lear, the person responsible for approving the license, with the DEA at the St. Louis office and she has indicated that Dr. Paskon has been approved at their office for a federal license number. the application has been sent to Washington D.C. by Ms. Lear for further processing, however no written license has been issued and it is beyond Dr. Paskon's control that it has not been completed.

Mrs. Thompson question if Dr. Paskon had a license prior to the application on December 20th. Mr. Mitchell reported that there was a period of time from December 20th back, that he did not individually have a current BNDD and DEA license.

Attorney Seay stated that the hospital was at liability since Dr. Paskon did not have a current federal license and according to the

DR. PASKON (Continued)

medical staff bylaws he must have one to be on staff. Mr. Mitchell explained that he was not familiar with the medical staff bylaws, but that he proposed three alternatives to the situation: 1) comply with the bylaws and suspend privileges; 2) choose to take a practical course and confirm that his application has been approved and is waiting on Washington D.C. to mail the license or 3) redefine the "flood plane" and have no problem. Mr. Seay replied that even if the board wanted to amend the bylaws, it could not be tonight since it takes 30 days to approve a change. He further stated that he has reviewed the bylaws thoroughly and understands Dr. Paskon's situation, however from an attorney's view, he cannot, with good conscience, allow the governing board to condone Dr. Paskon to stay on staff with a current DEA license.

Dr. Paskon stated that the rest of the staff should be checked to determine if their licenses are up-to-date. Mr. Seay reported, that to the best of his knowledge, all the active staff had current licenses at the time of reappointment with the exceptions of Drs. Paskon and Dr. Tang. Dr. Tang's copy of his license was received within a week after reappointment, however if someone else was not in good shape, the same recommendation would be made.

Mr. Mitchell stated that the board has already allowed an exception for 30 days and the question is now, "how long do you want to extend"? He then suggested that the board confirm with the DEA office in St. Louis that approval has been granted.

DR. PASKON (Continued)

One of the principle concerns discussed was the "liability" issue of Dr. Paskon practicing and prescribing drugs within the hospital without a DEA license. Attorney Seay pointed out that any deviation from the bylaws could be an issue, especially in the Browning litigation which Dr. Paskon is involved in. Mr. Hocker stated that the board will carry the resentment for his action but it is not the board's fault, since they are only carrying out the bylaws, and it is a decision that has to be made. Dr. Paskon then stated, "that I have been wanting to quit this place for some time, . . cannot take it anymore".

Following more discussion, Dr. Paskon and Mr. Mitchell were asked to be excused from the meeting for a few moments for the board to discuss the matter in their absence. They agreed to do so and left the meeting.

Specifics pertaining to a "summary suspension" in the medical staff bylaws rules and regulations were reviewed. Discussion was held regarding continuing the hospital's liability exposure. Attorney Seay stated that Dr. Demorlis would need to inform Dr. Paskon's patients, if he was suspended tonight, the options that they would have since Dr. Paskon would no longer have privileges at the hospital. Also the emergency room coverage would need to be covered since Dr. Paskon was on call tonight. Dr. Demorlis indicated that he would assume coverage for the remainder of the shift.

Dr. Paskon and Mr. Mitchell reentered the meeting at the request of the board.

DR. PASKON (Continued)

A motion was made by Jim Hocker, seconded by Dennis Fiebelman that the board suspend the privileges of Dr. Seth Paskon as of 2/27/89 (10:45 p.m.) for his failure to have a current and valid federal narcotic license, pursuant to the summary suspension privileges of the medical staff bylaws. A voice vote was taken: Jim Hocker-Yes; Dennis Fiebelman-Yes; Fern Highley-Yes; Gary Plank-No and Judy Thompson-Yes. A majority of the Executive Committee voted to approve the suspension.

Dr. Paskon was informed that he could make a request to the medical staff for a hearing concerning the suspension.

ADJOURNMENT

The meeting adjourned at 10:55 p.m.

/s/ Gary Plank
Secretary/Treasurer

/s/ George W. Bay
Chairman

APPENDIX F

AMENDMENT XIV—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Materials for the Citizenship and Privileges and Immunities Clauses of Section 1 are set out in this volume. See the following three volumes for materials pertaining to the Due Process and Equal Protection Clauses of that section and Sections 2 to 5.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may be a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX G

Missouri Revised Statutes, Chapter 206.105 reads as follows:

206.105. Bylaws of board of trustees, contents—applications to practice, contents.—

1. The board of hospital trustees shall include in its bylaws that every physician, a podiatrist and dentist requesting permission to practice in its hospital shall submit an application for staff membership in writing to it upon forms approved by the board. In his application each applicant shall given specifically his training and qualifications, his willingness to accept the board as the Supreme governing authority of the hospital, his willingness to accept the board as the supreme governing authority of the hospital, his willingness to abide by the bylaws of the board and the staff in all respects, and his determination to practice his profession in a manner which is legal, moral, and ethical. A written copy of all such bylaws, with any amendments, shall be kept on file in the office of the hospital administrator and shall be available to all staff members and applicants during normal business hours.

2. The professional staff of the hospital shall be an organized group which shall initiate and, with the approval of the board, adopt bylaws, rules, regulations, and policies governing professional activities in the hospital. General practitioners may practice in the hospital in accordance with their competence as recommended by the professional staff and as authorized by the board.

APPENDIX H

SALEM MEMORIAL
DISTRICT HOSPITAL

MEDICAL STAFF BYLAWS
RULES AND REGULATIONS

FIRST PRINTING AUGUST 1970
REVISED:

APRIL 1972	AUGUST 1982	OCTOBER 1986
OCTOBER 1973	SEPTEMBER 1983	FEBRUARY 1987
FEBRUARY 1976	MARCH 1984	MAY 1988
APRIL 1979	SEPTEMBER 1984	
MARCH 1981	FEBRUARY 1985	
MARCH 1982	SEPTEMBER 1985	
JULY 1982	MARCH 1986	

ARTICLE VI: CLINICAL PRIVILEGES

SECTION I. CLINICAL PRIVILEGES RESTRICTED

a. Every practitioner practicing at this hospital by virtue of medical staff membership or otherwise, shall, in connection with such practice, be entitled to exercise only those clinical privileges specifically granted to him by the governing body, except as provided in Sections II and III of this Article VI.

b. Every initial application for staff appointment must contain a request for the specific clinical privileges desired by the applicant. The evaluation of such requests shall be based upon the applicant's education, training, experience, demonstrated competence, references and other relevant information, including an appraisal by the service in which such privilege are sought. The applicant shall have the burden of establishing his qualifications and competency in the clinical privileges he requests.

c. Periodic re-determination of clinical privileges and the increase of curtailment of same shall be based upon the direct observation of care provided, review of the records of patients treated in this or other hospitals and review of the records of the medical staff which document the evaluation of the member's participation in the delivery of medical care.

Applications for additional clinical privileges must be in writing. To assure uniformity, they should be submitted on a prescribed form, on which the type of clinical privileges desired and the applicant's relevant recent training and/or experience must be stated. Such applications shall be processed in the same manner as applications for initial appointment.

d. Privileges granted to dentists and podiatrists shall be based on their training, experience and demonstrated competence and judgment. The scope and extent of surgical procedures that each dentist and podiatrist may perform shall be specifically delineated and granted in the same manner as all other surgical privileges. Surgical procedures performed by dentists and podiatrists shall be under the overall supervision of the chief of surgery of the medical staff. All dental and podiatric patients shall receive the same basic medical appraisal as patients admitted to other surgical services. A physician member of the medical staff shall be responsible for the care of any medical problem that may be present at the time of admission or that may arise during hospitalization.

e. Under Article V of these Bylaws, Sections, I, II, and III that apply to appointment and reappointment of medical staff members would also apply to granting and reappraisal of clinical privileges.

SECTION II. **TEMPORARY PRIVILEGES**

a. Upon receipt of an application for medical staff membership from an appropriately licensed practitioner, the chief executive officer may, upon the basis of information then available which may reasonably be relied upon as to the competence and ethical standing of the applicant, and with the written concurrences of the chief of medical staff, grant temporary admitting and clinical privileges to the applicant; but in exercising such privileges, the applicant shall act under the supervision of the chief of service to which he is assigned.

b. Temporary clinical privileges may be granted by the chief executive officer for the care of a specific patient to a practitioner who is not an applicant for membership in the same manner and upon the same conditions as set forth in

subparagraph a. of this Section II, provided that there shall first be obtained such practitioner's signed acknowledgment that he has received and read copies of the medical staff bylaws, rules and regulations and that he agrees to be bound by the terms thereof in all matters relating to his temporary clinical privileges. Such temporary privileges shall be restricted to a period not exceeding ninety (90) days, after which such practitioner shall be required to apply for membership on the medical staff before being allowed to attend additional patients.

c. The chief executive officer may permit a physician serving as a *locum tenens* for a member of the medical staff to attend patients without applying for membership on the medical staff for a period not to exceed ninety (90) days, providing all of his credentials have first been approved by the chief of medical staff.

d. Special requirements of supervision and reporting may be imposed by the chief of medical staff on any practitioner granted temporary privileges. Temporary privileges shall be immediately terminated by the chief executive officer upon notice of any failure by any practitioner to comply with such special conditions.

e. The chief executive officer may, at any time, upon the recommendation of the chief of the medical staff, terminate a practitioner's temporary privileges effective as of the discharge from the hospital of the practitioner's patient(s) then under his care in the hospital. However, where it is determined that the life or death of such patient(s) would be endangered by continued treatment by the practitioner, the termination may be imposed by any person entitled to impose a summary suspension pursuant to Section II, a of Article VII of these bylaws, and the same shall be immediately effective. The chief of the medical staff shall assign

a member of the medical staff to assume responsibility for the care of such terminated practitioner's patient(s) until they are discharged from the hospital. The wishes of the patient(s) shall be considered where feasible in selection of such substitute practitioner.

ARTICLE VII: CORRECTIVE ACTION

SECTION I. PROCEDURE

a. Whenever the activities or professional conduct of any practitioner with clinical privileges are considered to be lower than the standards or aims of the medial[sic] staff or be disruptive or be disruptive to the operations of the hospital, corrective action against such practitioner may be requested by any officer of the medical staff, by the chairman of any standing committee of the medical staff, by the chief executive officer, or by the governing body. All requests for corrective action shall be in writing, shall be made to the executive committee, and shall be supported by reference to the specific activities or conduct which constitute the grounds for the request.

b. Whenever the corrective action could be a reduction or suspension of clinical privileges, the executive committee shall immediately appoint an ad hoc committee to investigate the matter.

c. Within fourteen (14) days after the committee's receipt of the request for corrective action, or following receipt of a report from a committee following the committee's investigation of a request for corrective action involving reduction or suspension of clinical privileges, the executive committee shall take action upon the request. If the corrective action could involve a reduction or suspension of clinical privileges, or a suspension or expulsion from the medical staff, the affected practitioner shall be permitted to

make an appearance before the executive committee prior to its taking action on such request. This appearance shall not constitute a hearing, shall be preliminary in nature, and none of the procedural rules provided in these bylaws with respect to hearings shall apply thereto. A record of such appearance shall be made by the executive committee.

e. The action of the executive committee on a request for corrective action may be to reject or modify the request for corrective action, to issue a warning, a letter of admonition, or a letter of reprimand, to impose terms of probation or a requirement for consultation, to recommend that an already imposed summary suspension of clinical privileges be terminated, modified or sustained, or to recommend that the practitioner's staff membership be suspended or revoked.

f. Any recommendation by the executive committee for reduction, suspension or revocation of clinical privileges, or for suspension or expulsion from the medical staff shall entitled the affected practitioner to the procedural rights provided in Article VIII of the bylaws.

g. The chairman of the executive committee shall promptly notify the chief executive officer in writing of all requests for corrective action received by the executive committee and shall continue to keep the chief executive officer fully informed of all action taken in connection therewith. After the executive committee has made its recommendation in the matter, the procedure to be followed shall be as provided in Article V, Section II, and in Article VIII if applicable, of these bylaws.

SECTION II. **SUMMARY SUSPENSION**

a. Any one of the following—chairman of the executive committee, the president of the medical staff, the chief executive officer, the executive committee of either the

medical staff or the governing body—shall each have the authority, whenever action must be taken immediately in the best interest of patient care in the hospital, to summarily suspend all or any portion of the clinical privileges of a practitioner, and each summary suspension shall become effective immediately upon imposition.

b. A practitioner whose clinical privileges have been summarily suspended shall be entitled to request that the executive committee of the medical staff hold a hearing on the matter within such reasonable time period thereafter as the executive committee may be convened in accordance with Article VIII of these bylaws.

c. The executive committee may recommend modification, continuance or termination of the terms of the summary suspension. If, as a result of such hearing, the executive committee does not recommend immediate termination of the summary suspension, the affected practitioner shall, also in accordance with Article VIII, be entitled to request an appellate review by the governing body, but the terms of the summary suspension as sustained or as modified by the executive committee shall remain in effect pending a final decision thereon by the governing body.

d. Immediately upon the imposition of a summary suspension, the chairman of the executive committee shall have the authority to provide for alternative medical coverage for the patients of the suspended practitioner still in the hospital at the time of such suspension. The wishes of the patients shall be considered in the selection of such alternative practitioner.

SECTION III. **AUTOMATIC SUSPENSION**

a. Action by the State Board of Medical Examiners revoking or suspending a practitioner's license, or placing him upon

probation, shall automatically suspend all of his hospital privileges.

b. It shall be the duty of the chief of the medical staff to cooperate with the chief executive officer in enforcing all automatic suspensions.

ARTICLE VIII: HEARING AND APPELLATE REVIEW PROCEDURE

SECTION I. RIGHT TO HEARING AND TO APPELLATE REVIEW

a. When any practitioner receives notice of a recommendation of the executive committee that, if ratified by decision of the governing body, will adversely affect his appointment to or status as a member of the medical staff or his exercise of clinical privileges, he shall be entitled to a hearing before an ad hoc committee of the medical staff. If the recommendation of the executive committee following such hearing is still adverse to the affected practitioner, he shall then be elected to an appellate review by the governing body before the governing body makes a final decision on the matter.

b. When any practitioner receives notice of a decision by the governing body that will affect his appointment to or status as a member of the medical staff or his exercise of clinical privileges, and such decision is not based on prior adverse recommendation by the executive committee of the medical staff with respect to which he was entitled to a hearing and appellate review, he shall be entitled to a hearing by a committee appointed by the governing body, and if such hearing does not result in a favorable recommendation, to an appellate review by the governing body, before the governing body makes a final decision on the matter.

c. All hearings and appellate reviews shall be in accordance with the procedural safeguards set forth in article VIII to assure that the affected practitioner is accorded all rights to which he is entitled.

SECTION II. **REQUEST FOR HEARING**

a. The chief executive officer shall be responsible for giving prompt written notice of an adverse recommendation or decision to any affected practitioner who is entitled to a hearing or to an appellate review, by certified mail, return receipt requested. Failure of physician to request a hearing in 30 days will automatically waive rights to a request a hearing.

b. The failure of a practitioner to request a hearing to which he is entitled by these bylaws within the time and in the manner herein provided shall be deemed a waiver of his right to such hearing and to any appellate review to which he might otherwise have been entitled on the matter. The failure of a practitioner to request an appellate review to which he is entitled by these bylaws within the time and in the manner herein provided shall be deemed a waiver of his right to such appellate review on the matter.

c. When the waivered hearing or appellate review to an adverse recommendation of the executive committee of the medical staff or of a hearing committee appointed by the governing body, the same shall thereupon become and remain effective against the practitioner pending the governing body's decision on the matter. When the waivered hearing or appellate review relates to an adverse decision by the governing body, the same shall thereupon become and remain effective against the practitioner in the same manner as a final decision of the governing body provided for in Section 7 of this Article VIII. In either of such events, the chief executive office shall promptly notify the affected

practitioner of his status by certified mail, return receipt requested.

SECTION III. **NOTICE OF HEARING**

a. Within fourteen (14) days after receipt of a request for hearing from a practitioner entitled to the same, the executive committee or the governing body, whichever is appropriate, shall schedule and arrange for such a hearing and shall, through the chief executive officer, notify the practitioner of the time, place and date so scheduled by certified mail, return receipt requested. The hearing date shall be not less than 14 days, nor more than 30 days from the date of receipt of the request for hearing; provided, however, that a hearing for a practitioner who is under suspension which is then in effect shall be held as soon as arrangements therefore, may reasonably be made, but not later than 30 days from the date of receipt of such practitioner's request for hearing.

b. The notice of hearing shall state in concise language the acts or omissions with which the practitioner is charged, a list of specific or representative charts being questioned, and/or other reasons or subject matter that was considered in making the adverse recommendation or decision.

SECTION IV. **COMPOSITION OF HEARING COMMITTEE**

a. When a hearing relates to an adverse recommendation of the executive committee, such a hearing shall be conducted by an ad hoc hearing committee of not less than 3 members of the medical staff appointed by the president of the medical staff in consultation with the executive committee, and one of the members so appointed shall be designated as chairman. No staff member who has actively participated in the consideration of the adverse recommendation shall

be appointed a member of this hearing committee unless it is otherwise impossible to select a representative group due to the size of the medical staff.

b. When a hearing relates to an adverse decision of the governing body that is contrary to the recommendation of the executive committee, the governing body shall appoint a hearing committee to conduct such hearing and shall designated one of the members of this committee as chairman. At least one representative from the medical staff shall be included on this committee when feasible.

SECTION V. **CONDUCT OF HEARING**

a. There shall be at least a majority of the members of the hearing committee present when the hearing takes place, and no member may vote by proxy.

b. An accurate record of the hearing must be kept. The mechanism shall be established by the ad hoc hearing committee, and may be accomplished by use of a court reporter, electronic recording unit, detailed transcription or by the taking of adequate minutes.

c. The personal presence of the practitioner for whom the hearing has been scheduled shall be required. A practitioner who fails without good cause to appear and proceed at such hearing shall be deemed to have waived his rights in the same manner as provided in Section 2 of this Article VIII and to have accepted the adverse recommendation or decision involved, and the same shall thereupon become and remain in effect as provided in said Section 2.

d. Postponement of hearings beyond the time set forth in these bylaws shall be made only with the approval of the ad hoc hearing committee. Granting of such postponements shall only be for good cause shown and in the sole discretion of the hearing committee.

e. The affected practitioner shall be entitled to be accompanied by and/or represented at the hearing by a member of the medical staff in good standing.

f. Either a hearing officer, if one is appointed, or the chairman of the hearing committee or his designee, shall preside over the hearing to determine the order of procedure during the hearing, to assure that all participants in the hearing have a reasonable opportunity to present relevant oral and documentary evidence, and to maintain decorum.

g. The hearing need not be conducted strictly according to rules of law relating to the examination of witnesses or presentation of evidence. Any relevant matter upon which responsible persons customarily rely on the conduct of serious affairs shall be considered, regardless of the existence of any common law or statutory rule which might make evidence inadmissible over objection in civil or criminal action. The practitioner for whom the hearing is being held shall, prior to or during the hearing, be entitled to submit memoranda concerning any issue of procedure or of fact and such memoranda shall become a part of the hearing record.

In reaching a decision, official notice may be taken by the hearing committee, either before or after submission of the matter for decision, of any generally accepted technical or scientific matter relating to the issues under consideration at the hearing and of any facts which may be judicially noticed by the courts of the state where the hearing is held. Participants in the hearing shall be informed of the matters to be noticed and those matters shall be noted in the record of hearing. The practitioner for whom the hearing is being held shall be given the opportunity, on request, to refute the officially noticed matters by evidence or by written or oral presentation of authority, the manner of such refutation to

be determined by the hearing committee. The committee shall also be entitled to consider any pertinent material contained on file in the hospital, and all other information which can be considered in connection with applications for appointment to the medical staff and for clinical privileges pursuant to these bylaws.

h. The executive committee, when its action has prompted the hearing, shall appoint one of its members or some other medical staff member to represent it at the hearing, to present the facts in support of its adverse recommendation, and to examine witnesses. The governing body, when its action has prompted the hearing, shall appoint one of its members to represent it at the hearing, to present the facts in support of its adverse decision and to examine witnesses. It shall be the obligation of such representative to present appropriate evidence in support of the adverse recommendation or decision, but the affected practitioner shall thereafter be responsible for supporting his challenge to the adverse recommendation or decision by an appropriate showing that the charges or grounds involved lack any factual basis or that such basis or any action based thereon is either arbitrary, unreasonable or capricious.

i. The affected practitioner shall have the following rights: to call and examine witnesses, to introduce written evidence, to cross-examine any witness or any matter relevant to the issue of the hearing, to challenge any witness and to rebut any evidence. If the practitioner does not testify in his own behalf, he may be called and examined as if under cross-examination. The hearing committee *may* order that oral evidence be taken only on oath or affirmative administered by any person entitled to notarize documents in the state where the hearing is held.

j. The hearing provided for in these bylaws are for the purpose of resolving, on an intra-professional basis, matters bearing on professional competency and conduct. Accordingly, neither the affected practitioner, nor the executive committee of the medical staff or the governing body, shall be represented at any phase of the hearing procedure by an attorney at law unless the hearing committee, in its discretion, permits both sides to be represented by counsel. The foregoing shall not be deemed to deprive the practitioner, the executive committee of the medical staff, or the governing body, of the right to legal counsel in connection with preparation for the hearing or for a possible appeal; and, if a hearing officer is utilized, he may be an attorney at law.

k. The hearing committee may, without special notice, recess the hearing and reconvene the same for the convenience of the participants or for the purpose of obtaining new or additional evidence or consultation. Upon conclusion of the presentation of oral and written evidence, the hearing shall be closed. The hearing committee may thereupon, at a time convenient to itself, conduct its deliberations outside the presence of the practitioner for whom the hearing was convened.

l. Within thirty (30) days after final adjournment of the hearing, the hearing committee shall make a written report and recommendation and shall forward the same together with the hearing record and all other documentation to the executive committee or to the governing body, whichever appointed it. The report may recommend confirmation, modification, or rejection of the original adverse recommendation of the executive committee or decision of the governing body. Thereafter, the procedure to be followed shall be as provided in Section 2 of Article V of these bylaws.

SECTION VI. APPEAL TO THE GOVERNING BODY

a. Within thirty (30) days after receipt of a notice by an affected practitioner of an adverse recommendation or decision made or adhered to after a hearing as above provided, he may, by written notice to the governing body delivered through the chief executive office by certified mail, return receipt requested, request an appellate review by the governing body. Such notice may request that the appellate review be held only on the record on which the adverse recommendation or decision is based, as supported by the practitioner's written statement provided for below, or may also request that oral argument be permitted as part of the appellate review.

b. If such appellate review is not requested within thirty (30) days, the affected practitioner shall be deemed to have waived his right to the same, and to have accepted such adverse recommendation or decision, and the same shall become effective immediately as provided in Section 2 of this Article VIII.

c. Within thirty (30) days after receipt of such notice of request for appellate review, the governing body shall schedule a date for such review, including a time and place for oral argument if such as been requested, and shall, through the chief executive office, by written notice sent by certified mail, return receipt requested, notify the affect practitioner of the same. The date of the appellate review shall not be less than 14 days, nor more than 30 days, from the date of receipt of the notice of request for appellate review, except that when the practitioner requesting the review is under a suspension which is then in effect, such review shall be scheduled as soon as the arrangements for it may reasonably be made, but not more than 30 days from the date of receipt of such notice.

d. The appellate review shall be conducted by the governing body or by a duly appointed appellate review committee of the governing body of not less than 3 members.

e. The affected practitioner shall have access to the report and record (and transcription, if any) of the ad hoc hearing committee and all other material, favorable to unfavorable, that was considered in making the adverse recommendation or decision against him. he shall have 14 days to submit a written statement in his own behalf, in which those factual and procedural matters with which he disagrees, and his reasons for such disagreement, shall be specified. This written statement may cover any matters raised at any step in the procedure to which the appeal is related, and legal counsel may assist in its preparation. Such written statement shall be submitted to the governing body through the chief executive office by certified mail, return receipt requested, at least 14 days prior to the scheduled date for the appellate review. A similar statement may be submitted by the executive committee of the medical staff or by the chairman of the hearing committee appointed by the governing body, and if submitted, the chief executive officer shall provide a copy thereof to the practitioner at least 14 days prior to the date of such appellate review by certified mail, return receipt requested.

f. The governing body or its appointed review committee shall act as an appellate body. It shall review the record created in the proceedings, and shall consider the written statements submitted pursuant to subparagraph e. of this Section 6, for the purpose of determining whether the adverse recommendation of decision against the affected practitioner was justified and was not arbitrary or capricious. If oral argument is requested as part of the review procedure, the affected practitioner shall be present at such appellate review, shall be permitted to speak against the

adverse recommendation or decision, shall be permitted to speak against the adverse recommendation or decision, and shall answer questions put to him by any member of the appellate review body. The executive committee or the governing body, whichever is appropriate, shall also be represented by an individual who shall be permitted to speak in favor of the adverse recommendation or decision and who shall answer questions put to him by any member of the appellate review body.

g. New or additional matters not raised during the original hearing or in the hearing committee report, nor otherwise reflected in the record, shall only be introduced at the appellate review under unusual circumstances, and the governing body or the committee thereof appointed to conduct the appellate review shall in its sole discretion determine whether such new matters shall be accepted.

h. If the appellate review is conducted by the governing body, it may affirm, modify or reverse its prior decision, or, in its discretion, refer the matter back to the executive committee of the medical staff for further review and recommendation within 30 days. Such referral may include a request that the executive committee of the medical staff arrange for further hearing to resolve specified disputed issues.

i. If the appellate review is conducted by a committee of the governing body, such committee shall, within 30 days after the scheduled or adjourned date of the appellate review, either make a written prior decision, or refer the matter back to the executive committee for further review and recommendation within 30 days. Such referral may include a request that the executive committee of the medical staff arrange for a further hearing to resolve disputed issues. Within 30 days after receipt of such recommendation after referral, the committee shall make its recommendation to the governing body as above provided.

j. The appellate review shall not be deemed to be concluded until all the procedural steps provided in this Section 6 have been completed or waived. Where permitted by the hospital bylaws, all action required of the governing body may be taken by a committee of the governing body duly authorized to act.

SECTION VII. **FINAL DECISION BY GOVERNING BODY**

a. Within thirty (30) days after the conclusion of the appellate review, the governing body shall make its final decision in the matter and shall send notice thereof to the executive committee and, through the chief executive officer, to the affected practitioner, by certified mail, return receipt requested. If this decision is in accordance with the executive committee's last recommendation in the matter, it shall be immediately effective and final, and shall not be subject to further hearing or appellate review. If this decision is contrary to the executive committee's last such recommendation, the governing body shall refer the matter to the joint conference committee for further review and recommendation within 30 days, and shall include in such notice of its decision a statement that a final decision will not be made until the joint conference committee's recommendation has been received. At its next meeting after receipt of the joint conference committee's recommendation, the governing body shall make its final decision with like effect and notice as first above printed in this Section 7.

b. Not withstanding[sic] any other provision of these bylaws, no practitioner shall be entitled as a right to more than one hearing and one appellate review on any matter which shall have been the subject of action by the executive committee of the medical staff, or by the governing body, or by a duly authorized committee of the governing body, or by both.

APPENDIX I

SALEM MEMORIAL DISTRICT HOSPITAL

Board of Directors Executive Committee Meeting

April 7, 1989 - 4:00 p.m.

The Board of Directors Executive Committee met on this date in the hospital library at 4:00 p.m. Those present were: George Bay, Chairman; Judy Thompson, Vice-Chairman; Gary Plank, Secretary/Treasurer; William Camm Seay, Hospital Attorney; Dennis Pryor, Administrator; and Tammy Scheets, Administrative Secretary.

The meeting was called to order at 4:05 p.m. by Chairman, George Bay, who explained that the meeting was called to discuss Dr. Paskon's request, addressed to John Demorlis, Chief of Staff, to have a hearing concerning his summary suspension. (see attached letter)

Mr. Pryor commented that the request was addressed to the Chief of Staff for a hearing by the Medical Staff Executive Committee, however, according to the Medical Staff Bylaws, the hearing should be conducted by a committee of at least two board members, and one physician, as appointed by the Chairman of the Board. He further commented that according to the bylaws, Dr. Paskon must be given a response to his request within 14 days from receipt of letter, with a hearing to be held within 30 days.

Mr. Plank pointed out that he feels since the decision to suspend Dr. Paskon was given by the governing board, then the governing board should conduct the hearing. Attorney Seay stated that it his interpretation of the Medical Staff Bylaws that the governing board should comprise the hearing committee, and that even if the Medical Staff Executive Committee would conduct the hearing, the governing board must then approve any action taken.

Following discussion, it was the consensus of the committee that the Chairman appoint a committee of two board members, and one physician to the hearing committee, to be held on Monday, April 17, 1989 at 8:00 a.m. in the hospital library.

In accordance with Article VIII, Section I, Subsection b, of the Medical Staff Bylaws and Regulations, Chairman Bay appointed Judy Thompson, Chairman; Gary Plank, and John Demorlis, M.D. to the hearing committee, with the administrative secretary present to tape record and take written minutes.

Chairman of the hearing committee, Judy Thompson, stated, that in accordance with Article VIII, Section V, Subsection j, no attorneys will be permitted to attend the hearing.

Chairman Bay requested that a letter be written to Dr. Paskon from the Administrator, informing Dr. Paskon of the date and time of hearing, the hearing committee members, and that no attorneys will be allowed to attend the meeting.

ADJOURNMENT - The meeting adjourned at 4:50 p.m.

/s/ Gary Plank
Secretary/Treasurer

/s/ George W. Bay
Chairman

APPENDIX J

SALEM MEMORIAL DISTRICT HOSPITAL

P.O. Box 774
Hwy. 72 N., Salem, MO 65560
Phone:(314) 729-6626

April 10, 1989

Seth Paskon, M.D.
224 West Fourth Street
Salem, Missouri 65560

Dear Dr. Paskon:

The Governing Board Executive Committee met on April 7, 1989 at 4:00 p.m. in the library with the hospital attorney and myself to discuss your request of a hearing with the Medical Staff Executive Committee regarding your summary suspension that was issued by the board of directors.

The Governing Board Executive Committee agreed that you are entitled a hearing according to Article VIII, Section I, Subsection b. of the Medical Staff Bylaws Rules and Regulations. In accordance with Article VIII, Section IV, Subsection b, the Chairman of the Governing Board Executive Committee appointed a hearing committee that consists of Judy Thompson, Chairman, Gary Plank and John Demorlis, M.D., Chief of Staff.

The hearing committee will meet with you on April 17, 1989 at 8:00 a.m. in the hospital library. The Chairman of the Hearing Committee has requested that attorneys at law will not be permitted at the hearing according to Article VIII, Section V, Subsection j.

Page Two

The Hearing Committee appointed Tammy Scheets, Administrative Secretary, to record the hearing by tape recording and taking of minutes.

If I can be of further assistance in this matter, feel free to call me.

Sincerely,

/s/ Dennis P. Pryor,
Administrator

DPP/tks

Copies: George Bay, Chairman of the Board
Hearing Committee Members

APPENDIX K

Austin L. Mitchell
Attorney at Law

April 14, 1989

Mr. Dennis P. Pryor
Administrator
Salem Memorial District Hospital
Highway 32 North
Box 774
Salem, Missouri 65560

Dear Mr. Pryor:

Re: Dr. Seth Paskon

Pursuant to the Salem Memorial District Hospital Medical Staff Bylaws Rules and Regulations (Bylaws), Article VII, Section II, Subsection b.:

> . . . [a] practitioner whose clinical privileges have been summarily suspended shall be entitled to request that the executive committee of the medical staff hold a hearing on the matter within such reasonable time period thereafter as the executive committee may be convened in accordance with Article VIII of those bylaws.

By requesting that Dr. Paskon attend a proposed hearing conducted under Article VIII, Section I, Subsection b. of the Bylaws, you are failing to comply with your Article VII, Section II, administrative procedure specifically relating to summary suspension and you are depriving him of one level of administrative procedural rights guaranteed him under your Bylaws.

Please request of your Governing Board Executive Committee that it comply with its Bylaws by granting to Dr. Paskon the

hearing requested under, and guaranteed by, Article VII, Section II, Subsection b. as such administrative procedure relates to appeal of summary suspensions.

Sincerely yours,

/s/ Austin L. Mitchell

ALM:bg
cc: Dr. Seth Paskon
William Camm Seay, Attorney

APPENDIX L

SALEM MEMORIAL DISTRICT HOSPITAL

P.O. Box 774
Hwy. 72 N., Salem, MO 65560
Phone:(314) 729-6626

April 17, 1989

Seth Paskon, M.D.
224 West Fourth Street
Salem, Missouri 65560

Dear Dr. Paskon:

In pursuant to our letter, dated April 10, 1989, the hearing committee met today, April 17, at 8:00 a.m. to discuss, with you, your summary suspension that was issued by the Board of Directors.

Your failure to appear without good cause at such hearing shall be deemed to have waived your rights as provided in Article VIII, Section V, Subsection C:

> . . The personal presence of the practitioner for whom the hearing has been scheduled shall be required. A practitioner who fails without good cause to appear and proceed at such hearing shall be deemed to have waived his rights in the same manner as provided in Section 2 of this Article VIII and to have accepted the adverse recommendation or decision involved, and the same shall thereupon become and remain in effect as provided in said Section 2.

Page Two

If I can be of further assistance, please feel free to call.

Sincerely,

/s/ Dennis P. Pryor,
Administrator

DPP/tks

Copies: Judy Thompson, Hearing Committee Chairman
Gary Plank, Hearing Committee Member
John Demorlis, M.D., Hearing Committee Member
George Bay, Chairman, Board of Directors
William Camm Seay, Hospital Attorn-
Austin Mitchell

APPENDIX M

Austin L. Mitchell
Attorney at Law

April 24, 1989

Board of Directors
Salem Memorial District Hospital
Highway 72 North
Box 774
Salem, Missouri 65560

Dear Members:

Re: Seth Paskon, M.D.

On behalf of Dr. Seth Paskon, I am reiterating the request for a hearing, pursuant to Article VII, Section II, subsection., on his purported summary suspension.

Enclosed are copies of the two requests previously made for a hearing on the purported summary suspension which you issued February 27, 1989. The summary suspension section (Article VII, Section II) of the Salem Memorial District Hospital Medical Staff Bylaws Rules and Regulations (Bylaws), as revised May, 1988, enumerates the specific administrative appeal procedures to be followed subsequent to a summary suspension.

Since specific procedures are enumerated in your Bylaws for administrative appeal of a summary suspension, I have advised Dr. Paskon not to attend the other hearing which was offered. Further, pursuant to your Bylaws, I have advised Dr. Paskon not to attend the meeting this evening to which he was invited and which was to have been "off the record" with counsel not present.

I urge you, as members of the Board, to formally offer to Dr. Paskon the opportunity to exercise his administrative appeal rights by granting him a hearing by the executive committee of

the medical staff, pursuant to Article VII, Section II, subsection b., regarding the purported summary suspension.

Sincerely,

/s/ Austin L. Mitchell

Enclosures
ALM:bg
cc: Dr. Seth Paskon
W. Camm Seay
Attorney at Law

APPENDIX N

SALEM MEMORIAL DISTRICT HOSPITAL

Medical Staff Executive Staff Committee Meeting

April 17, 1989 - 6:30 p.m.

The Medical Staff Executive Committee met on this date in the Administrator Office for a special meeting. Those present were: John Demorlis, M.D., Chief of Staff; Ted C. Tang, M.D., Vice-Chief of Staff; Charles Cunningham, D.O., Secretary; Dennis Pryor, Administrator; and Tammy Scheets, Administrative Secretary.

The meeting was scheduled to discuss Dr. Paskon's application for appointment to the medical staff.

Dr. Paskon was placed on summary suspension by the Board of Directors on February 27, 1989 for failure to have a current DEA license. The DEA license was then received by Dr. Paskon and he was granted temporary privileges on March 3, 1989, and applied for appointment to the medical staff the next week.

Dr. Paskon's application and copies of current licenses were reviewed by the committee.

Mr. Pryor pointed out that if the Medical Staff approves Dr. Paskon's application, the Board of Directors has asked that Dr. Paskon attend the Board meeting on Monday, April 24th to discuss, in person, his appointment to the Medical Staff.

Following discussion, the Executive Staff Committee, (Dr. Demorlis, Dr. Tang and Dr. Cunningham) unanimously recommended Dr. Paskon's appointment to the medical staff.

The meeting adjourned at 7:00 p.m.

/s/Charles W. Cunningham, D.O.
Secretary

/s/John Demorlis, M.D.
Chief of Staff

Medical Staff Regular Meeting
EXECUTIVE SESSION
April 17, 1989
Page 4

DR. PASKON - APPOINTMENT

Mr. Pryor reported that the Medical Staff Executive Committee had met prior to tonight's meeting and reviewed Dr. Paskon's appointment to the medical staff. The committee unanimously agreed to approve Dr. Paskon's appointment to the active staff. A motion was then made by Dr. Carnett to approve active staff privileges for Dr. Paskon, seconded by Dr. Farquhar and carried with all active staff voting yes.

Dr. Paskon discussed the summary suspension granted by the Board of Directors on February 27, 1989 and explained that three days after the suspension he received his DEA license, applied for medical staff privileges at this point and was approved for temporary staff privileges, and he questioned what was now being approved? Mr. Pryor explained the sequence of events as follows: 1) Dr. Paskon was granted a summary suspension by the Board on February 27, 1989 for failure to have a current DEA license; 2) On March 3, 1989, the DEA license number that Dr. Paskon received was verified with the DEA office; 3) Temporary privileges were granted on this day (March 3) and summary suspension was lifted; 4) Request for a hearing was received within the proper time frame and the Executive Committee of the Board was contacted. At this time they interpreted the Medical Staff Bylaws to read that the hearing committee should consist of members from the governing body and a member of the medical staff, chosen by the Chairman of the Board. 5) The hearing committee met on April 10, 1989 at 8:00 a.m. and Dr. Paskon did not attend. He further commented that Dr. Paskon has been asked by the Board to attend the April Board meeting to discuss his appointment.

Medical Staff Regular Meeting
EXECUTIVE SESSION
April 17, 1989
Page 5

DR. PASKON - APPOINTMENT (Continued)

Mr. Pryor then read the portion of the Medical Staff Bylaws, pertaining to Summary Suspension, Article VII, Section II, and Conduct of Hearing, Article VIII, Section V, Subsection c. Discussion was held on the Articles that were read. Dr. Paskon was questioned as to why he did not attend the hearing, since it was held at his request. Dr. Paskon reiterated that his interpretation of the Bylaws state the hearing committee should be comprised of the Medical Staff Executive Committee, not the Governing Board.

Mr. Pryor again mentioned that the board wanted to meet with Dr. Paskon to discuss his reappointment. Dr. Paskon suggested that a formal letter be written, requesting his presence at the board meeting, and Mr. Pryor agreed to send the letter.

The meeting adjourned at 10:25.

/s/Charles W. Cunningham, D.O.
Secretary

/s/John Demorlis, M.D.
Chief of Staff

APPENDIX O

SALEM MEMORIAL DISTRICT HOSPITAL

P.O. Box 774
Hwy. 72 N., Salem, Mo. 65560
Phone:(314) 729-6626

April 21, 1989

Seth Paskon, M.D.
224 West Fourth Street
Salem, Missouri 65560

Dear Dr. Paskon:

At the March 27, 1989 Board of Directors Meeting, the directors asked Gary Plank to meet with you personally and discuss why they want to meet with you at the April 24, 1989 Board of Directors Meeting. At that meeting, it would be a closed record, closed vote with the tape machine off and 'No Attorneys' present so everyone is free to speak.

During the April 17, 1989 Medical Staff Meeting, you requested the invitation to be placed into writing. Per your request, the Board of Directors ask that you attend the April 24, 1989 Board of Directors Meeting to discuss certain matters concerning your reappointment.

Sincerely,

Dennis P. Pryor
Administrator

DPP/dfh

"Commitment to Caring"

APPENDIX P

Board of Directors Regular Meeting
EXECUTIVE SESSION
April 24, 1989
Page 3

DR. PASKON

Mrs. Thompson reiterated that the hearing committee had met the morning of April 17th and Dr. Paskon did not show or call, and that according to Article VIII, Section V, subsection c. of the Medical Staff Bylaws, Dr. Paskon has waived all of his rights concerning the summary suspension. Also, a letter was written to Dr. Paskon requesting his presence at tonight's meeting. The Board discussed the fact that Dr. Paskon, and his legal counsel, Austin Mitchell, feel that the board has not complied with the Medical Staff Bylaws concerning the summary suspension and hearing procedure, and that Dr. Paskon wants an apology from the Board. It was the feeling of the Board that the Bylaws have been followed and no apology is necessary.

Austin Mitchell entered the meeting at 8:45 p.m. at the Board's request.

Copies of a letter from Mr. Mitchell were handed out (see attached) and discussed. Mr. Mitchell explained that he was here to reiterate a request for hearing pursuant to Article VII, Section II, subsection b, on Dr. Paskon's summary suspension. He further explained that the reason for Dr. Paskon's absence at tonight's meeting was that he (Dr. Paskon) is asking for the Board to comply with the Medical Staff Bylaws. Mr. Mitchell then left the meeting.

Mr. Pryor reported that the medical staff met on April 17, 1989, for their regular meeting, and unanimously approved Dr. Paskon's appointment to the medical staff. The Medical Staff Executive Committee met prior to the meeting and reviewed Dr. Paskon's

Board of Directors Regular Meeting
EXECUTIVE SESSION
April 24, 1989
Page 4

DR. PASKON (Continued)

application, they all agreed that all credentials were in order. Also during the Executive Session of the Medical Staff meeting, Dr. Paskon stated that if the Board wanted to meet with him at the Board meeting, on April 24th, a letter should be written stating this request. The letter was written by Mr. Pryor as requested, and was mailed on April 21, 1989. (see attached)

Discussion followed concerning Dr. Paskon's appointment and the sequence of events leadings up to tonight's meeting. Concern was expressed over the fact that Dr. Paskon did not attend the meeting to discuss his appointment in person, as requested. Attorney Seay stated that the Board has a right to deny appointment based on Dr. Paskon's absence at tonight's meeting, since he was requested to be here, however privileges cannot be denied for personal reasons, such as attitude, etc. He further explained that if approval is not granted at this time, the issue will go before a Joint Conference Committee, who will then make a recommendation, and that recommendation will go back to the Board for a final decision.

At this time Fern Highley made a motion that Dr. Paskon's appointment be tabled until the next Board meeting. Mr. Pryor commented that Dr. Paskon was granted temporary privileges on March 3, 1989 for 90 days, which would expired around the 1st of June, and that if the Board decides at the May meeting not to grant privileges, problems could arise with emergency room coverage. Following more discussion, Mrs. HIghley rescinded her motion.

Board of Directors Regular Meeting
EXECUTIVE SESSION
April 24, 1989
Page 5

DR. PASKON (Continued)

REGULAR SESSION

At 10:02 p.m., Fern Highly made a motion that the Board go into regular session for the purpose of voting on the medical staff privileges of Seth Paskon, M.D., motion seconded by Jim Hocker and carried with a voice vote: Jim Hocker-Yes; Fern Highley-Yes; Dennis Fiebelman-Yes; Gary Plank-Yes; Judy Thompson-Yes and George Bay-Yes.

At 10:03 p.m., a motion was made by Jim Hocker that Dr. Paskon's appointment privileges to the medical staff not be approved, motion seconded by Dennis Feibelman and carried as follows, with one opposition: Jim Hocker-Yes; Fern Highley-Yes; Dennis Feibelman-Yes; Gary Plank-No; and Judy Thompson-Yes.

ADJOURNMENT

The meeting adjourned at 10:12 p.m.

/s/Gary Plank
Secretary/Treasurer

/s/George Bay
Chairman

APPENDIX Q

SALEM MEMORIAL DISTRICT HOSPITAL

JOINT CONFERENCE MEETING

June 23, 1989 - 7:00 a.m.

The Joint Conference Committee met on this date in the hospital library: Those present were: George Bay, Chairman; Jim Hocker; Judy Thompson; J. D. Shukla, M.D.; Charles Cunningham, D.O.; Dennis Pryor, Administrator; and Tammy Scheets, Administrative Secretary.

The meeting was called to order at 7:10 a.m. by Chairman George Bay.

Mr. Pryor pointed out that Dr. Tang, Chief of Staff, had been invited to the meeting, due to the absence of the Chief of Staff, Dr. Demorlis, but declined due to his personal relationship with Dr. Paskon.

Mr. Pryor explained that according to the medical staff bylaws, a joint conference meeting is necessary before a final decision can be made concerning Dr. Paskon.

A summarization of events, pertaining to Dr. Paskon, beginning January 16, 1989 were reviewed. Dr. Cunningham commented that the quotes made by Dr. Paskon were typewritten incorrectly and recommended that they be rewritten, changing, "He" to "I". There were no objections to this change. Minutes of the hearing committee, dated June 9, 1989, were reviewed.

Chairman Bay reported that the hearing committee voted to confirm the adverse recommendation of the governing body (four members voted, three-yes and 1 abstain).

Jim Hocker pointed out that the medical staff unanimously approved Dr. Paskon's application for staff privileges and felt

the committee should listen as to how the doctors feel about the situation. Dr. Shukla commented that there was no reason, clinically, not to approve Dr. Paskon's application for active staff privileges, and that denial of his privileges by the board would be upsetting to Dr. Paskon and the hospital, however, he feels that Dr. Paskon has been given ample time to meet with the board and discuss any problems.

Following discussion, a motion was made by Judy Thompson that minutes of today's meeting be given to the Board, and let the Board make the final decision, motion seconded by Jim Hocker and carried.

/s/George W. Bay
Joint Conference Committee Chairman

APPENDIX R

Salem Memorial
SMDH
District Hospital

P.O. Box 774 * (Highway 72.N)
Salem, Missouri 65560
(314) 729-6636

July 23, 1991

Seth Paskon, M.D.
224 West Fourth Street
Salem, Missouri 65560

Dear Dr. Paskon:

The Board of Directors met last night at their regular July meeting to discuss your appointment to the Salem Memorial District Hospital Medical Staff.

The Appellate Review which was held on July 8, 1991 by the Appellate Review Committee recommended by a vote of 3 to 2 to confirm the Hearing Committee's recommendation to place Dr. Paskon back on staff with a six month probationary period, along with the legal minimum requirements to complete medical records. The Board of Directors voted 5 to 0 to accept the Appellate Review Committee's recommendation to admit Dr. Seth Paskon to the active medical staff of Salem Memorial District Hospital with the following modifications and restrictions:

1) That as provided by the bylaws the appointment be provisional (probationary) for a period of six months.

2) That the limitation on his staff privileges be as follows:

    a) That he be allowed to admit patients to the hospital and attend them under the supervision of

the chairman of the medical staff of that department.

b) That he not be allowed to provide scheduled emergency room services at the hospital but may attend to a patient in the emergency room which specifically requests him.

c) That he has his medical records after discharge completed within ten days after discharge.

d) That he attend all medical staff meetings during probation and when requested to, will attend any quality assurance and utilization review meetings.

e) That he will attend any hospital board meetings upon 72 hours written notice.

f) That he will provide the Administrator of the hospital information concerning any investigation, restrictions or limitations on his medical license or narcotics license within 24 hours of notice to the probationer.

g) That he will provide written information upon request justifying his gross deviation from DRG reimbursement standards on his patients admitted to the hospital.

3. That he agree to abide by the medical staff bylaws of the hospital and cooperate with the hospital administration, staff and medical staff.

4. That he furnish the hospital sufficient proof of his malpractice insurance and further agree to accept all

responsibility and liability due to his practice and performance at the hospital.

Your rights to the hearing and appellate review process will continue as deemed in the medical staff bylaws.

Sincerely,

Dennis P. Pryor
Administrator

tka